SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 65

LILY CLAPIER, PETITIONER,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA.

Docket Entries

Dec. 11, 1931.—Bill of Complaint filed, subpœna issued.

Jan. 13, 1932.—Subpœna returned served on Carl E. Resley, Treasurer of the National Radiator Corporation at Pittsburgh, Pa., on December 30, 1931. Served on an adult member of the family of John H. Waters at Southmont, Johnstown, Pa., on January 5, 1932.

Jan. 19, 1932.—Præcipe for appearance of Reed, Smith, Shaw & McClay for Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, filed.

Jan. 19, 1932.—Motion of Rudolph B. Flershem, Charles O. Cornell, John H. Waters, and Frank B. Cahn, to dismiss the Bill of Complaint filed.

Jan. 19, 1932.—Præcipe for special appearance of H. S. Endsley for National Radiator Corporation filed.

Jan. 19. 1932.—Motion of National Radiator Corporation to dismiss the Bill of Complaint filed.

Mar. 29, 1932.—Plaintiff's motion for stay of all proceedings at No. 2558 Equity pending final determination of this case filed.

May 31, 1932.—Opinion and decree dismissing the bill filed and entered.

July 5, 1932.—Exception noted to Decree, upon request of counsel for plaintiff.

[fol. 2] July 12, 1932.—On petition of plaintiff, order entered allowing an appeal.

July 12, 1932.—Assignments of Error filed.

July 13, 1932.—Citation issued, returnable Aug. 12, 1932.

July 21, 1932.—Bond on appeal approved and filed.

July 25, 1932.—Præcipe for record on appeal filed.

July 28, 1932.—Appellee's præcipe for record on appeal filed.

IN UNITED STATES DISTRICT COURT.

In Equity. No. 2597

BILL OF COMPLAINT—Filed Dec. 11, 1931

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, sitting in equity:

The complainant, Lily Clapier, brings this bill of complaint on behalf of herself and on behalf of all other creditors of the defendant, National Radiator Corporation, who are opposed to, and have refused to accept the Plan and Agreement dated February 11, 1931 for the reorganization of the National Radiator Corporation, and alleges as follows:

First. The complainant Lily Clapier, is a resident and citizen of the State of New York.

Second. This complainant alleges upon information and belief that the defendants, Rudolph B. Flershem, Charles O. Cornell, are residents and citizens of the State of New [fol. 3] York; the defendant, John H. Waters, is a citizen of the State of Pennsylvania; and the defendant, Frank B. Cahn, is a resident and citizen of the State of Maryland; and the defendant, National Radiator Corporation is a corporation duly organized under the laws of the State of Delaware, and a citizen and resident of that State.

Third. This complainant was and now is the legal owner and holder of Eleven Thousand Dollars ($11,000), aggregate principal amount of the debentures of the defendant, National Radiator Corporation referred to in the certain Bill of Complaint described in Paragraph "Fourth" of this Bill of Complaint, all payable to bearer, to each of which bonds are attached all coupons appurtenant thereto including the coupons, each in the sum of $32.50, which became due and payable on the 1st day of February, 1931, and the 1st day of August, 1931, and by reason thereof, the complainant, is, therefore, a creditor of the defendant, National Radiator Corporation, in the sum of Eleven Thousand Seven Hundred and Fifteen Dollars ($11,715), with interest upon the sum of Three Hundred Fifty-seven Dollars and Fifty Cents ($357.50), part thereof from the 1st day of

February, 1931, and upon the sum of Three Hundred Fifty-seven Dollars and Fifty Cents ($357.50), part thereof from the 1st day of August, 1931.

Fourth. This complainant further alleges upon information and belief that on or about the 9th day of October, 1931, a bill of complaint was duly filed in the District Court of the United States for the Western District of Pennsyl- [fol. 4] vania by the defendants, Rudolph B. Flershem, Charles O. Cornell, John H. Waters, and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, as complainants, against the defendant, National Radiator Corporation, as defendant, a copy of which Bill of Complaint is hereto annexed, marked Schedule "A" and made part of this Bill of Complaint.

Fifth. This complainant, however, does not annex to this Bill of Complaint Schedule "A," a copy of the Indenture, and Schedule "B," a copy of the Plan and Agreement, which are annexed to said Bill of Complaint, and which are, as already stated, duly filed in this Court, but this complainant prays leave to refer to the said Bill of Complaint and Schedules "A" and "B" thereto annexed, with the same force and effect as if herein set forth at length.

Sixth. This complainant further alleges upon information and belief that simultaneously with the filing of said Bill of Complaint, the defendant, National Radiator Corporation, as defendant in said cause duly appeared and filed its answer therein admitting the allegations of the Bill of Complaint and consenting to the relief prayed for therein; a copy of which answer is hereto annexed, made part hereof and marked Schedule "B."

Seventh. This complainant further alleges upon information and belief that thereupon this Court upon said Bill of Complaint and said Answer, duly entered and recorded a [fol. 5] decree in said cause, a copy of which decree is hereto annexed and made part hereof and marked Schedule "C."

Eighth. This complainant further alleges upon information and belief that said decree is erroneous and improper on the face of the record in said cause and ought to be re-

viewed, reversed, and set aside for many apparent reasons and imperfections including the following:

(a) Because the Bill of Complaint upon which the decree was rendered does not state facts sufficient to constitute any cause of action in Equity or does it set forth any grounds to authorize the exercise of any jurisdiction in equity in behalf of said complainants or either or any of them by way of the appointment of receivers or other equitable relief.

(b) Because in so far as said complainants or either or any of them have any cause of action or ground for complaint or redress in reference to any of the matters or things alleged in said Bill of Complaint, they and each of them have perfect and complete remedies at law, and therefore, have no right to any equitable relief by way of the appointment of receivers or otherwise.

(c) Because the rendering and recording of the decree upon the Bill of Complaint in said cause deprives this complainant and other holders of debentures of the defendant, National Radiator Corporation, who are opposed to and refuse to accept the Plan and Agreement referred to in said Bill of Complaint, of their property without due process of law, in violation of and in contravention of Article V of [fol. 6] the Articles of Amendment of the Constitution of the United States.

(d) Because the rendering and recording of the decree upon the Bill of Complaint in said cause deprives this complainant and other holders of debentures of the defendant, National Radiator Corporation, who are opposed to and refuse to accept the Plan and Agreement referred to in said Bill of Complaint in said cause, of their rights under the provisions of Article VII of the Articles of Amendment of the Constitution of the United States.

(e) Because the defaults in the payment of interest were wilful and deliberate and wholly unnecessary and were part of a collusive scheme to delay, hinder, obstruct, and deprive this complainant and other holders of debentures who are opposed to and have refused to accept the Plan and Agreement referred to in said Bill of Complaint, of their lawful contract rights under and by virtue of the debentures of the defendant, National Radiator Corporation.

(f) Because the appointment of the receivers in said cause was without the duly authorized consent of said defendant, National Radiator Corporation.

Ninth. This complainant further alleges upon information and belief that no decree should have been rendered in said cause, but that said Bill of Complaint should have been dismissed.

Tenth. This complainant has no adequate remedy at law and can have relief only in equity, and, therefore, files this [fols. 7 & 8] bill of complaint on behalf of herself and on behalf of all other creditors of the defendant, National Radiator Corporation, who are opposed to and have refused to accept the Plan and Agreement dated February 11, 1931, for the Reorganization of the defendant, National Radiator Corporation, and who may come in and contribute to the expenses of this cause.

In consideration whereof, this complainant prays that the decree entered and recorded in the other cause be reviewed, reversed, vacated, and set aside, and no further proceedings taken thereon. To the end, therefore, that the defendants may show cause why this complainant should not have the relief prayed for, this complainant prays that a subpoena be directed to said defendants commanding them at a certain time to show cause why said decree should not be reviewed, reversed, vacated, and set aside as prayed for.

Lily Clapier, by Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Her Solicitors.

Duly sworn to by Lily Clapier. Jurat omitted in printing.

[fol. 9] SCHEDULE "A" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS and FRANK B. CAHN, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

against

NATIONAL RADIATOR CORPORATION, Defendant

Bill of Complaint

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, sitting in equity:

The complainants, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, bring this their Bill of Complaint against National Radiator Corporation on their own behalf and on behalf of all other creditors of the defendant who may join in the prosecution of this suit, and allege upon information and belief as follows:

[fol. 10] First. The complainants, Rudolph B. Flershem and Charles O. Cornell, are residents and citizens of the State of New York; the complainant, John H. Waters, is a resident and citizen of the State of Pennsylvania; and the complainant, Frank B. Cahn, is a resident and citizen of the State of Maryland.

Second. The defendant, National Radiator Corporation, is a corporation duly organized and existing under the laws of the State of Delaware, and a citizen and resident of said State. The principal office of the defendant is in the City of Johnstown, in the Commonwealth of Pennsylvania, in the Western District of Pennsylvania, and a substantial part of the properties owned by the defendant is located in said Western District of Pennsylvania, including two manufacturing plants in said City of Johnstown, a

manufacturing plant in the City of New Castle and other properties and assets.

Third. The ground upon which the jurisdiction of this Court depends in this suit is the diversity of citizenship of the plaintiffs and of the defendant, and the matter in controversy in this suit is in excess of the sum of $5,000 exclusive of interest, costs and expenses. This suit is brought for the purpose of enforcing the claim of the complainants against the defendant; for the determination of the claims of the creditors of the defendant; and for the sale of the assets of the defendant and the distribution of the net proceeds of said assets among the creditors of the defendant in accordance with their respective rights and for the other relief hereinafter prayed.

[fol. 11] Fourth. Shortly before August 30, 1927, the defendant duly authorized an issue of its 6½% Sinking Fund Gold Debentures (hereinafter called the "Debentures") in the aggregate principal amount of $16,000,000. The Debentures are coupon debentures in denominations of $1000 and $500 dated August 1, 1927, payable August 1, 1947, and bear interest from August 1, 1927, at the rate of 6½% per annum, payable semi-annually on the 1st days of February and August in each year, upon the presentation and surrender of the interest coupons thereto attached and are in the form or substantially the form set forth in the Indenture hereinafter mentioned. For the purpose of setting forth the terms and provisions governing the issue of the Debentures and appurtenant coupons and the rights and remedies of the holders thereof on or about August 30, 1927, the defendant duly made and executed under its corporate seal and delivered to Bankers Trust Company, a corporation of the State of New York, as Trustee, its Indenture dated August 1, 1927 (hereinafter called the "Indenture"). At the time of the execution and delivery of the Indenture, Bankers Trust Company was duly authorized and empowered to act as Trustee thereunder and duly accepted the trusts under the Indenture and united in the execution of the Indenture. A copy of the Indenture is hereto annexed and marked "Schedule A" and made a part of this Bill of Complaint, and complainants pray leave to refer to the same with the same force and effect as if herein set forth at length.

The Indenture was and is the proper act and deed of the defendant, was by it duly authorized, made and delivered [fol. 12] in all respects in conformity with law and *and* remains in full force and effect.

Fifth. After the execution and delivery of the Indenture, and on or about August 30, 1927, the defendant duly executed $12,000,000 aggregate principal amount of Debentures with all appurtenant coupons in substantially the form provided by the Indenture and said Bankers Trust Company, as Trustee, authenticated the same and delivered them to or upon the order of the defendant, all in accordance with the provisions of the Indenture.

Sixth. Thereafter the defendant duly negotiated and sold for value and issued to numerous bona fide purchasers thereof said $12,000,000 aggregate principal amount of Debentures with all coupons for interest thereunto appertaining. Of the Debentures so issued, $1,169,000 principal amount have been delivered by the defendant from time to time since the execution of the Indenture and prior to the verification of this Bill of Complaint to said Bankers Trust Company, as Trustee, for cancellation in lieu of the semi-annual Sinking Fund payments provided for in the Indenture, and the Debentures so delivered have been cancelled by said Bankers Trust Company, all as provided in the Indenture.

Seventh. Of the Debentures issued as aforesaid, $126,000 principal amount have been purchased and acquired by the defendant and are now held in its treasury. At the date hereof $10,705,000 principal amount of said Debentures are [fol. 13] outstanding in the hands of divers persons who are the owners and holders thereof for value and said Debentures are now in all respects valid and outstanding obligations of the defendant.

Eighth. On February 1, 1931, the defendant made default in payment of the interest then falling due on all said Debentures issued and outstanding as aforesaid although the coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

Ninth. On or about February 11, 1931, the complainants, Rudolph B. Flershem, Charles O. Cornell, and John H.

Waters, under a Plan and Agreement of Reorganization dated February 11, 1931 (hereinafter called the "Plan and Agreement") constituted themselves a Reorganization Committee for the purpose of effecting the reorganization of the defendant. A copy of the Plan and Agreement is hereto annexed and marked "Schedule B" and made a part of this Bill of Complaint, and complainants pray leave to refer to the same with the same force and effect as if herein set forth at length. On or about September 17, 1931, the complainant, Frank B. Cahn was duly elected a member of the Reorganization Committee as provided in Article 16 of the Reorganization Agreement with the effect in said Article 16 provided. The Plan and Agreement provides, among other things, that holders of said Debentures of the defendant may become parties to said Plan by depositing their Debentures with the February 1, 1931 and all subsequent coupons with Bankers Trust Company, as Depositary, and that such deposit of Debentures shall [fol. 14] transfer to and vest in the Reorganization Committee the legal title to such deposited Debentures and the coupons appertaining thereto. More than $8,736,000 principal amount of Debentures have been deposited with Bankers Trust Company, as Depositary under the Plan and Agreement, together with coupons for interest on said Debentures due on February 1, 1931, and all subsequent interest dates, and the complainants are now the holders and owners of said Debentures and said coupons.

Tenth. On August 1, 1931, the defendant made default in payment of the interest then falling due on all the Debentures issued and outstanding as aforesaid, although the coupons or some thereof appurtenant to said Debentures were duly presented for payment and payment duly demanded.

Eleventh. Shortly before the verification of this Bill of Complaint, the complainants, as the holders and owners of coupons representing interest on the Debentures due February 1, 1931, in the aggregate amount of not less than $283,920, and as the holders and owners of coupons representing interest on the Debentures due August 1, 1931, in the aggregate amount of not less than $283,920, duly presented all of said coupons for payment at the place specified for the payment thereof and duly demanded of the defend-

ant payment thereof in full and the defendant made, default in the payment of all of said coupons and the interest thereby represented and omitted and refused to pay the same or any part thereof, and the defendant is therefore at the date hereof indebted to the complainants on account [fol. 15] of said coupons and the interest thereby represented in an amount not less than $567,840, together with interest thereon, and no part of said sum has been paid and no bond or other security has been given for the payment thereof.

Twelfth. The defendant is engaged principally in the business of manufacturing and selling heating appliances, round and sectional boilers and hot water and steam radiators. The defendant owns manufacturing plants in the Cities of Johnstown and New Castle, Commonwealth of Pennsylvania, in the Western District of Pennsylvania; in the City of Trenton, State of New Jersey, in the District of New Jersey; in the City of Framingham, Commonwealth of Massachusetts, in the District of Massachusetts; in the Cities of Dunkirk and North Tonawanda, State of New York, in the Western District of New York; and in the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division. In all of the aforesaid places the defendant owns substantial amounts of property, including real estate, plants, mills and warehouses, and also stocks of raw materials, goods in process and finished goods. The defendant also owns warehouses in the City of Baltimore, State of Maryland, in the District of Maryland; in the City of Cincinnati, State of Ohio, in the Southern District of Ohio, Western Division; in Washington, D. C.; and in the City of Richmond, State of Virginia, in the Eastern District of Virginia; wherein are stored finished goods and other property of the defendant.

[fol. 16] Thirteenth. The defendant has no means at hand with which to meet, pay or satisfy the interest charges on the Debentures overdue as aforesaid, without seriously jeopardizing the ability of the defendant to continue its business and without making it difficult or impossible for the defendant to secure necessary supplies, materials and labor to continue the operation of its plants and the sale of its products. The defendant does business and has sales offices generally throughout the United

States; the sale of its products is dependent upon a feeling of confidence among its customers that its business will be continued so that repair parts will be available and servicing of its products will not cease. A large part of the property of the defendant consists of land, buildings, fixtures, plants, machinery, patterns and other equipment, trade-marks and patents which are not immediately available for the payment of the indebtedness of the defendant and cannot be levied upon or converted into cash or sold except as an entirety without great sacrifice. Certain of the properties of the defendant cannot be levied upon and sold in an action at law and said properties can be sold as an entirety and as a going concern only through the intervention of a court of equity.

Fourteenth. Certain holders of the Debentures not deposited with the complainants have threatened to bring suits in respect of interest due on their coupons and may levy execution upon the property of the defendant. An attempt by the complainants to enforce their claim as a [fol. 17] general creditor would precipitate immediate action on the part of other creditors of the defendant in different courts, and, unless this Court will take jurisdiction in this cause for the protection of every interest in the property and assets of the defendant, the result will be a multiplicity of suits, a race of diligence, wasteful strife and controversy; attempts will be made to obtain judgments and priorities; levies will be made upon the working capital, materials and supplies indispensable to the operation of the business of the defendant and this will result in the dismantling and dismemberment of its properties and will greatly interfere with and ultimately prevent the defendant from continuing to operate its properties, and will result in dissipating the administrative, technical and sales forces of the defendant, which cannot be reassembled without great cost, and in destroying the confidence of the customers of the defendant and the cancellation of many orders now on its books. The unity of the property of the defendant and its integrity as a whole, as now held and operated, the administrative, technical and sales organization and the good-will of its customers constitute most important elements of value, and to permit their severance and dissipation will result in ruinous sacrifice of every interest in said property, to the great loss and damage to

the complainants and other creditors of the defendant. It is to the best interests of the defendant and the complainants and other creditors of the defendant that the going concern value of the defendant's business and properties should be maintained, continued and kept intact for the benefit of all creditors, until all of the assets and business [fol. 18] of the defendant can be sold as an entirety, and the complainants believe that this can be accomplished and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a court of equity and the granting of equitable relief for the preservation of all of the property of the defendant as a going concern, and enjoining all creditors from interfering with or attempting to obtain any priorities and thus permitting a sale of all of the assets of the defendant for the benefit of all creditors.

Fifteenth. Complainants have no adequate remedy at law and no other previous application has been made for the relief herein sought.

In consideration whereof, and inasmuch as the complainants have no adequate remedy at law and can have relief only in equity, the complainants file this their Bill of Complaint, on behalf of the complainants and all other creditors of the defendant who may hereafter join in the prosecution of this suit, and pray for equitable relief as follows:

1. That the rights of the complainants and of other creditors of the defendant may be ascertained, decreed and determined; that this Court will fully administer the fund in which the complainants are interested, constituting all the property and assets of the defendant, in accordance with the rights, equities, liens and priorities, if any, existing thereon, and will enforce and decree the rights, equities, liens and priorities of the creditors of the defendant as the same finally may be ascertained and decreed by this Court.

[fol. 19] 2. That this Court, for the purpose of granting the relief prayed for and to protect the rights and interest of the complainants and of other creditors of the defendant, take over unto itself the jurisdiction and control of all the assets and property of the defendant of every kind and description whatsoever, and that pending this suit it grant such specific relief as from time to time may be expedient and appropriate to maintain such jurisdiction and control.

3. That, upon application by the complainants for the purpose of preserving the unity and integrity of the property and assets of the defendant and of preventing disruption thereof by separate executions, attachments and levies during the pendency of this suit, a receiver or receivers be appointed by this Court of the defendant and all of its property and assets, real, personal and mixed and of whatsoever kind and description and wheresoever situated, and all the tolls, earnings, rents, issues, profits, revenues and income thereof, with the usual powers of receivers in such cases, and with full power and authority to take possession of the plants, properties, real and personal, premises, easements, franchises, rights, privileges and interests of the defendant of whatsoever kind and character, and to manage and operate the same and to continue the business of the defendant and to collect and receive the tolls, earnings, issues, rents, profits, revenues and income thereof and every part thereof and to apply the same as this Court from time to time may order or decree; and that such further powers and [fol. 20] authority as to this Court may seem meet and proper may be granted by it to any receiver or receivers so appointed.

4. That the properties and assets and business of the defendant may be ordered to be sold as an entirety, with such exceptions and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and that any such order shall make proper and suitable provisions for the protection of all equities, rights, priorities, claims and liens of the creditors of the defendant and shall provide for the sale of the property, assets and business of the defendant, subject to or free and clear from any and all liens or encumbrances, and that the proceeds of any such sale may be distributed by and under the direction of this Court among the creditors of the defendant and such others, if any, as this Court may adjudicate.

5. That pending this suit an injunction may issue out of and under the seal of this Court enjoining and restraining all creditors of the defendant from levying executions upon, attaching or intermeddling with or taking possession of any of the property and assets of the defendant.

6. That the complainants may have such other, further and different relief in the premises as to this Court may

seem proper and as may be necessary fully to protect and to enforce the rights and equities of the complainants and of all creditors of the defendant.

7. That a writ of subpœna may be granted to the complainants to be directed to the defendant, thereby requiring [fol. 21] said defendant to be and appear on a certain day before this Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree as to this Court shall seem meet.

Rudolph B. Flershem, Charles O. Cornell, John H. Waters, and Frank B. Cahn, the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, by Robert J. Dodds, Their Solicitor. Milbank, Tweed, Hope & Webb, Reed, Smith, Shaw & McClay, of Counsel.

Duly sworn to by Charles O. Cornell. Jurat omitted in printing.

[fol. 22]

SCHEDULE A

National Radiator Corporation
and
Bankers Trust Company, Trustee

Indenture Providing for an Issue of $16,000,000 Six and One-half per cent. Sinking Fund Gold Debentures.

Dated August 1, 1927

Indenture, dated the first day of August, 1927, between National Radiator Corporation, a corporation organized and existing under the laws of the State of Delaware, having its principal office at New York City, New York [fol. 23] (hereinafter called the Company), party of the first part, and Bankers Trust Company, a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York, New York (hereinafter sometimes called the Trustee), party of the second part.

Whereas, for the purpose of borrowing money for its lawful corporate purposes and of making payment for

properties necessary for the business of the Company, and in the exercise of the lawful powers in that behalf possessed by it, the Company has duly authorized and directed the issue of its debentures of the character hereinafter described, in the aggregate principal amount of $16,000,000, to be known as its "Six and One-Half Per Cent. Sinking Fund Gold Debentures" (hereinafter called the debentures), to be dated August 1, 1927, to mature on August 1, 1947 (unless called for previous redemption), to bear interest at the rate of six and one-half per centum (6½%) per annum from the first day of August, 1927, and in order to provide for the payment of the debentures and for the authentication thereof by the Trustee, and to establish and declare the terms and conditions upon which the debentures are to be issued, the Company has duly authorized and directed the execution and delivery of this Indenture; and

Whereas, pending, and in anticipation of, the preparation, execution and delivery of this Indenture, the Company has heretofore issued $1,935,000 principal amount of interim debentures as a part of the issue of debentures hereinabove referred to, which interim debentures are to be [fol. 24] replaced as hereinafter provided by debentures of the form herein described; and

Whereas, the debentures and the coupons to be attached thereto and the Trustee's certificate to be endorsed thereon are to be substantially in the following forms, with appropriate omissions, insertions and variations as by this Indenture permitted:

[Form of Debenture]

No. —. $ —.

United States of America,

State of Delaware

National Radiator Corporation Six and One-half Per Cent. Sinking Fund Gold Debenture

Due August 1, 1947

National Radiator Corporation, a corporation of the State of Delaware (hereinafter called the Company), for value received, hereby promises to pay to the bearer, or, if this debenture be registered, to the registered owner hereof on the first day of August, 1947, at the principal office of Bankers Trust Company or at the office of J. & W. Selig-

man & Co. in the Borough of Manhattan, The City and State of New York, or, at the option of the bearer or registered owner hereof, at the principal office of Continental and Commercial Trust and Savings Bank in Chicago, Illinois, the principal sum of — Dollars in gold coin of the [fol. 25] United States of America of or equal to the standard of weight and fineness existing August 1, 1927, and to pay interest thereon from the first day of August, 1927, at the rate of six and one-half per centum (6½%) per annum, in like gold coin, at any of said offices, semi-annually on the first days of February and August in each year until the payment of the principal sum hereof, but, up to the date of maturity hereof, only upon presentation and surrender of the interest coupons therefor hereto attached as they severally mature.

The interest on this debenture shall be paid without deduction for any Federal income tax (except such part thereof as may be in excess of two per cent (2%) per annum of such interest) which the Company or the Trustee under the Indenture hereinafter mentioned or any paying agent may be required or permitted to pay thereon or retain therefrom under any present or future law of the United States of America; which tax the Company agrees to pay, except as above mentioned. It is provided in said Indenture that the Company will reimburse the bearer, or, if this debenture be registered, the registered owner hereof, for any Pennsylvania or Connecticut personal property tax not exceeding four (4) mills per annum, or for any District of Columbia personal property tax not exceeding five (5) mills per annum, or for any Maryland securities tax not exceeding four and one-half (4½) mills per annum, which may be legally assessed against and paid by such bearer [fol. 26] or registered owner on each dollar of the principal amount or taxable value of this debenture, by reason of his ownership hereof, or for any income tax not in excess of six per centum (6%) per annum legally imposed by the Commonwealth of Massachusetts on account of the interest received hereon and paid by such bearer or registered owner, if application for any such reimbursement be made in writing to the Company as provided in the Indenture within sixty (60) days after payment of any such tax and in any event within six (6) months after such tax shall have become due and payable.

This debenture is one of a duly authorized issue of debentures of the Company, all of like date and tenor, except as to denominations, known as its "Six and One-half Per Cent Sinking Fund Gold Debentures", limited to an aggregate principal amount of $16,000,000, issued and to be issued under and pursuant to an Indenture (herein called the Indenture), dated August 1, 1927, executed and delivered by the Company to Bankers Trust Company (herein called the Trustee), as Trustee, to which Indenture reference is hereby made for a statement of the rights of the holders or registered owners of such debentures and coupons and of the Company and of the Trustee, and of the terms and conditions upon which the debentures are and are to be issued, received and held.

The debentures are subject to redemption, in whole, or in part by lot, at the option of the Company or from the [fol. 27] sinking fund hereinafter mentioned, on any interest payment date. Any redemption of debentures shall be upon at least forty (40) days' prior notice given by publication in a daily newspaper printed in the English language and published and of general circulation in the Borough of Manhattan, The City and State of New York, in the manner provided in the Indenture. The redemption price of any debentures redeemed as above provided shall be the principal amount of the debentures to be redeemed and accrued interest thereon to date of redemption, together with a premium calculated on the principal amount of the debentures to be redeemed as follows: seven and one-half per centum (7½%) if the date of redemption is on or before August 1, 1932, six per centum (6%) if the date of redemption is after August 1, 1932 and on or before August 1, 1937, four and one-half per centum (4½%) if the date of redemption is after August 1, 1937 and on or before August 1, 1942, and three per centum (3%) if the date of redemption is after August 1, 1942 and prior to the maturity date expressed in this debenture. From and after the date of redemption, interest on any debentures called for redemption shall cease, unless default shall be made in the redemption of such debentures on presentation. The debentures of this issue are entitled to the benefit of the sinking fund provided for in the Indenture, which sinking fund may be

paid by the Company in cash or in debentures or both as provided in the Indenture.

[fol. 28] In case an event of default, as defined in the Indenture, shall occur, the principal of all of the debentures issued thereunder and outstanding may become or be declared due and payable in the manner and with the effect provided in the Indenture.

As provided in the Indenture, debentures of the denomination of $1,000 or $500, at any time outstanding, when surrendered, and upon the payment of charges, may be exchanged for an equal aggregate principal amount of debentures of the other denomination, of numbers not contemporaneously outstanding.

This debenture is transferable by delivery unless registered as to principal in the name of owner at the office or agency of the Company in the Borough of Manhattan, The City and State of New York, such registration to be noted hereon. After such registration, no transfer hereof shall be valid unless made at said office or agency by the registered owner in person or by duly authorized attorney, and similarly noted hereon; but this debenture may be discharged from registration by being, in like manner, transferred to bearer; and thereupon transferability by delivery shall be restored, after which this debenture may again from time to time be registered or made transferable by delivery as before. Such registration, however, shall not affect the negotiability of the coupons hereto attached, which shall always continue to be payable to bearer and to be transferable by delivery merely.

[fol. 29] No recourse shall be had for the payment of the principal of or the interest on this debenture, or for any claim based hereon or otherwise in respect hereof or arising from the Indenture, against any incorporator, or against any past, present or future stockholder, director or officer of the Company, as such, or of any successor corporation, whether by virtue of any constitution, statute or rule of law, or by the enforcement of any assessment or penalty; all such liability being by the acceptance hereof, and as part of the consideration of the issue hereof, expressly waived and released by every holder or registered owner hereof.

Neither this debenture nor any coupon hereto attached shall be valid or become obligatory for any purpose unless

and until the certificate endorsed hereon shall have been executed by the Trustee under the Indenture.

In witness whereof, National Radiator Corporation has caused this debenture to be signed in its name by its President or a Vice-President, and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary, and coupons bearing the facsimile signature of its Treasurer to be hereunto attached, at The City of New York, New York. Dated August 1, 1927.

National Radiator Corporation, by —— ——, Vice-President.

[fol. 30] Attest:

—— ——, Assistant Secretary.

[Form of Interest Coupon]

No. —. $—.

On the first day of ——, 19—, unless the debenture hereinafter mentioned shall have been duly called for previous redemption and payment duly provided therefor, National Radiator Corporation will, upon the surrender hereof, pay to bearer at the principal office of Bankers Trust Company or at the office of J. & W. Seligman & Co. in the Borough of Manhattan, The City and State of New York, or, at the option of the bearer hereof, at the principal office of Continental and Commercial Trust and Savings Bank in Chicago, Illinois, — Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness existing August 1, 1927, without deduction for Federal income taxes (except such part thereof as may be in excess of 2% per annum of such interest) as provided in the debenture hereinafter mentioned, being six months' interest then due on its Six and One-half Per Cent. Sinking Fund Gold Debenture No. —.

—— ——, Treasurer.

[fol. 31] [Form of Trustee's Certificate]

This is one of the debentures described in the within mentioned Indenture.

Bankers Trust Company, Trustee, by —— ——, Assistant Secretary.

and

Whereas, all acts and things prescribed by law and by the certificate of incorporation and by-laws of the Company

necessary to make the debentures when executed by the Company and authenticated by the Trustee and duly issued the valid, binding and legal obligations of the Company in accordance with their terms, and constitute this Indenture a valid and binding agreement for the purposes and objects herein expressed, all in accordance with the terms, covenants and conditions herein contained, have been done and performed and have happened; and the execution and issue of the debentures and the execution and delivery of this Indenture have been in all respects duly authorized;

Now, therefore, this indenture witnesseth: That in order to provide for the payment of the debentures and the interest thereon, according to the true intent and meaning thereof, and in order to declare the covenants, terms and conditions upon or subject to which the debentures are to be issued, and for and in consideration of the premises and of the mutual covenants herein contained and of the purchase and acceptance of the debentures by the holders thereof, and of the sum of One Dollar lawful money of the [fol. 32] United States of America duly paid by the Trustee to the Company at or before the execution and delivery hereof, the receipt whereof is hereby acknowledged by the Company, the Company has executed and delivered this Indenture whereby the Company covenants and agrees with the Trustee for the equal and pro rata benefit (except as hereinafter in Section 2 of Article IV and Section 1 of Article V hereof expressly provided) of all present and future holders or registered owners of the debentures issued and to be issued under this Indenture, and of the coupons thereto attached, without preference, priority or distinction of any one debenture over any other debenture by reason of priority in the issue, sale or negotiation thereof, or otherwise, as follows:

Article I

Description, Execution, Exchange and Registration of Debentures

* * * * * * *

Section 6. The debentures shall be negotiable and shall pass by delivery, unless registered as to principal in the manner hereinafter provided. The Company at an office or agency to be maintained by it in the Borough of Manhattan,

City and State of New York, will keep or cause to be kept books for the registration (as to principal only) and for the transfer of debentures, as provided in this Indenture.

The principal office of the Trustee in the Borough of Manhattan, City and State of New York, is hereby fixed as the office or agency of the Company, for the time being, in said Borough of Manhattan, for the registration and transfer of [fol. 33] debentures as herein provided.

The holder of any debenture, whether temporary or definitive, may have the ownership thereof registered as to principal, at such office or agency and such registration shall be noted on the debenture. After such registration, no transfer thereof shall be valid unless made at such office or agency by the registered owner in person, or by duly authorized attorney, and similarly noted on the debenture; but such debenture may be discharged from registration by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored; after which such debenture may again from time to time be registered or made transferable by delivery as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be payable to bearer and to be transferable by delivery merely, and payment thereof to bearer shall fully discharge the Company in respect of the interest therein mentioned, whether the debenture be registered or not.

For any such registration or transfer of a debenture, the Company at its option may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge incidental thereto.

With respect to all debentures registered as to principal, the persons in whose names such debentures shall be registered shall for all purposes of this Indenture be deemed and regarded as the absolute owners thereof, and payment of [fol. 34] or on account of the principal of any such debentures shall be made only to or upon the order of such registered owners thereof, but such registration may be changed as herein provided. All such payments shall be valid and effectual to satisfy and discharge the liability of the Company upon such debentures to the extent of the sum or sums so paid. The Company and the Trustee and any Paying Agent of the Company may deem and treat the bearer of any debenture issued hereunder which shall not at the time

be registered as to principal, and the bearer of any coupon for interest on any debenture, whether such debenture be registered as to principal or not, and whether such debenture or coupon be overdue or not, as the absolute owner of such debenture or coupon, as the case may be, for the purpose of receiving payment thereof and for all other purposes whatsoever, and neither the Company nor the Trustee nor any such Paying Agent shall be affected by any notice to the contrary.

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Article II

Authentication and Issue of Debentures

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Article III

Sinking Fund and Redemption of Debentures

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Article IV

Particular Covenants of the Company

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[fol. 35] Article V

Remedies of Trustee and Holders of Debentures

Section 1. No coupon or claim for interest belonging to any of the debentures which in any way shall have been transferred or pledged separate and apart from the debenture to which it relates shall, unless accompanied by such debenture, be entitled in case of a default under this Indenture to any benefit of or from this Indenture except after the prior payment in full of the principal of the debentures and of all coupons or claims for interest not so transferred or pledged.

Section 2. In case one or more of the following events, herein termed events of default, shall happen, that is to say, in case

(a) default shall be made in the payment of any instalment of interest on any of the debentures when the same shall become payable, as therein or herein expressed; or

(b) Default shall be made in the payment of the principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration or otherwise; or

(c) default shall be made in the payment of any instalment of the sinking fund herein provided for when the same shall become payable; or

(d) the Company shall create, issue, sell or assume any secured debt or obligation or lien contrary to the covenants of the Company herein; or

(e) default shall be made in the observance of any other of the covenants or agreements on the part of the Company in the debentures or in this Indenture expressed, and the [fol. 36] Company shall not remedy such default within sixty (60) days after written notice of such default, requiring the Company to comply with the covenant or agreement in respect of which it is so in default, shall have been served upon the Company by the Trustee which may at its direction, and at the request of the holders of not less than one-tenth in principal amount of the debentures then outstanding shall, serve such notice; or

(f) the Company shall be adjudged bankrupt or become insolvent, or a receiver shall be appointed of all or a substantial part of the property of the Company and not be dismissed within thirty (30) days after appointment; or

(g) the Company shall file a petition for voluntary bankruptcy or make a general assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts as they become due; or

(h) final judgment for the payment of money shall be rendered against the Company and the Company shall not discharge the same or cause it to be discharged or a stay of execution to be procured thereon within sixty (60) days from entry thereof, or shall not within said period of sixty (60) days, or such longer period during which execution on such judgment shall have been stayed, appeal therefrom or from the order, decree or process upon which or pursuant to which said judgment was granted, passed or entered;

then the Trustee may in its discretion, and, upon request [fol. 37] in writing by the holders of at least one-fourth in

principal amount of the debentures then outstanding, shall, declare the principal of and interest on all the debentures, if not already due, to be forthwith due and payable, and upon such declaration the same shall become due and payable immediately. This provision, however, is subject to the conditions that if, at any time after the principal of the debentures shall have been so declared due and payable and before the recovery by the Trustee of final judgment or decree under this Indenture, all arrears of interest upon all of the debentures, with interest on overdue instalments of interest at the rate of six and one-half per centum (6½) per annum, and all arrears of sinking fund payments with interest on overdue payments at the rate of six and one-half per centum (6½) per annum, together with the reasonable charges and expenses of the Trustee, its agents and attorneys, shall be paid by the Company, and all other defaults under the debentures or any of them, or under this Indenture, shall be made good to the satisfaction of the Trustee, then and in such case the holders of a majority in principal amount of the debentures then outstanding, by written notice to the Company and to the Trustee, may rescind and annul such declaration and its consequences; but no such rescission or annulment shall extend to or affect any subsequent default or impair any right consequent thereon.

Section 3. In case

(a) default shall be made in the payment of any instalment of interest on any of the debentures when the same [fol. 38] shall become payable, as therein or herein expressed; or

(b) default shall be made in the payment of the principal of any of the debentures when the same shall become due and payable, either at maturity or by declaration or otherwise; or

(c) default shall be made in the payment of any instalment of the sinking fund herein provided for when the same shall become payable,

then, upon demand of the Trustee, the Company will pay to the Trustee, for the benefit of the holders and registered owners of the debentures and coupons then outstanding, the whole amount that then shall have become due and

payable on all such debentures and coupons then outstanding, for interest or principal, or both, or will pay to the Trustee all payments then due in respect of the sinking fund, as the case may be, with interest in each instance at the rate of six and one-half per centum (6½) per annum, upon the overdue principal, instalments of interest or sinking fund payments; and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee, its agents, attorneys and counsel, and any expenses or liabilities incurred by the Trustee hereunder; and, in case the Company shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid and to enforce such judgment in accordance with law.

[fol. 39] Any moneys thus collected by the Trustee shall be applied by the Trustee as follows:

(a) To the payment of all costs and expenses of such action, including reasonable compensation to the Trustee, its agents, attorneys and counsel and to the payment of all expenses, liabilities and advances made or incurred by the Trustee hereunder;

(b) In case the principal of the debentures shall not have become due, to the payment of the interest in default in the order of the maturity of the overdue instalments of such interest, with interest on the overdue instalments of interest at the rate of six and one-half per centum (6½) per annum; such payments to be made ratably to the persons entitled thereto, without discrimination or preference, subject, however, to the provisions of Section 2 of Article IV hereof and of Section 1 of this Article; or in case of default in the payment of any instalment of the sinking fund, to the payment of the sinking fund instalment so in default;

(c) In case the principal of the debentures shall have become due, to the payment of the whole amount then owing and unpaid upon the debentures for principal and interest, with interest at the rate of six and one-half per centum (6½) per annum on the overdue principal and overdue instalments of interest; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the debentures, then to the payment of such

[fol. 40] principal and interest, without preference or priority of principal over interest or of interest over principal or of any instalment of interest over any other instalment of interest, ratably to the aggregate of such principal and the accrued and unpaid interest; subject, however, to the provisions of Section 2 of Article IV hereof and of Section 1 of this Article.

The Company, for itself, its successors and assigns, covenants and agrees with the Trustee, that if by reason of the happening and continuance of any event of default aforesaid the Trustee at any time commence or institute any suit or action or other legal proceeding to recover any judgment as in this Section 3 provided, it will, and its successors and assigns shall, waiving the issue and service of process, thereupon enter a voluntary appearance in such suit or action or proceeding, and consent to the entry of judgment therein for any and all amounts then remaining due and unpaid on all such debentures and coupons then outstanding, for interest or principal or both, or in respect of said sinking fund, as the case may be, and for all costs and attorneys' fees in such suit or action or proceeding, and for all other sums payable hereunder.

In the event of any bankruptcy or receivership of the Company or its properties, the Trustee is hereby irrevocably appointed the true and lawful agent and attorney of the holders and registered owners of the debentures and coupons, with full power and authority to file with any court or officer thereof proof of debt on behalf of such holders and registered owners in respect of their debentures and coupons and/or as creditors of the Company with [fol. 41] respect thereto, and to demand, collect, receive, sue or take such other proceedings for the collection and recovery of any sums paid or payable thereon, as the Trustee may be advised; but the Trustee shall be under no obligation with respect thereto.

Section 4. In case, upon the happening and continuance of any event of default specified in Section 2 of this Article, the Trustee shall proceed by a suit in equity or action at law, as above provided, the Trustee shall be entitled, pending any such suit or action, as a matter of right, to the appointment of a receiver of the Company and of all of its properties, and of the earnings, revenues, rents, issues, profits and incomes thereof.

Section 5. Upon written request of the holders or registered owners of at least one-fourth in principal amount of the debentures at the time outstanding, and upon being indemnified to its satisfaction, if the Trustee shall so require, as hereinafter provided, it shall be the duty of the Trustee to take all steps needful for the protection and enforcement of its rights and the rights of the holders or registered owners of the debentures whether by judicial proceedings or otherwise as the Trustee, being advised by counsel, shall deem most expedient in the interest of the holders or registered owners of the debentures.

Section 6. No holder of any debenture or coupon shall have any right to institute any suit, action or proceeding in equity or at law for the enforcement of any covenant or [fol. 42] remedy contained in or given by this Indenture, unless the holders or registered owners of at least ten per cent (10%) in principal amount of the debentures then outstanding shall have given to the Trustee written notice of some event of default and of the continuance thereof for the period, if any, in Section 2 of this Article provided; nor unless the holders or registered owners of at least twenty-five per cent (25%) in principal amount of the debentures then outstanding shall have requested the Trustee in writing to take action in respect of the matter complained of, and shall have afforded to it a reasonable opportunity to institute such action, suit or proceeding in its own name; nor unless also such holders or registered owners of debentures shall have offered to the Trustee security and indemnity satisfactory to the Trustee against the costs, expenses and liabilities to be incurred therein or thereby; nor unless the Trustee for thirty (30) days after receipt of such notification, request and offer of indemnity shall have refused or neglected to act on such notification, request and offer of indemnity; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the Trustee, to be conditions precedent to the exercise of the powers and trusts of this Indenture and to the availability and the commencement and prosecution of any action or suit or proceeding hereunder, whether for the appointment of a receiver or for any other remedy; and it is expressly declared and intended that no one or more holders or registered owners of

debentures or coupons shall have any right to enforce any right hereunder, except in the manner herein provided, and [fol. 43] that all proceedings hereunder, at law or in equity, shall be instituted, had and maintained in the manner herein provided and for the equal and pro rata benefit of all holders or registered owners of such outstanding debentures and coupons.

Nothing in this Section or contained elsewhere in this Indenture or in the debentures or in the coupons attached thereto shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay the principal and interest of the debentures to the respective holders or registered owners of the debentures and to the respective holders of the coupons attached thereto, at the respective due dates in such debentures and coupons stated, nor affect or impair the right of action at law, which is also absolute and unconditional, of such holders to enforce such payment by virtue of the contract contained in the debenture and not by virtue or availing of any provision of this Indenture.

Section 7. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustee, or to the holders or registered owners of debentures, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and in addition to every other remedy given hereunder or now or hereafter available at law or in equity or by statute.

Section 8. No delay or omission of the Trustee or of any holder or registered owner of debentures to exercise any right or power accruing upon any event of default impair any such right or power or shall be construed to be a waiver [fol. 44] of any such default or acquiescence therein; and every power and remedy given by this Indenture to the Trustee or to the holders or registered owners of debentures may be exercised from time to time and as often as may be deemed expedient by the Trustee or by the holders or registered owners of debentures.

Section 9. All rights of action under this Indenture, or under any of the debentures or coupons, may be enforced by the Trustee without the possession of any of the debentures or coupons or the production thereof on any trial or other proceeding relative thereto, and any such suit or proceeding instituted by the Trustee shall be brought in its

name as Trustee, and any recovery of judgment shall be for the ratable benefit of the holders and registered owners of all of the debentures and coupons, except as provided in Section 2 of Article IV hereof, and Section 1 of this Article.

Article VI

Immunity of Stockholders, Officers and Directors

Article VII

Methods of Proof

Article VIII

The Trustee

[fol. 45]

Article IX

Defeasance

Article X

Concerning Consolidation, Merger and Sale

Section 1. Nothing in this Indenture contained shall prevent the consolidation or merger of the Company with or into any other corporation, or prevent any consolidation or merger with or into the Company of any other corporation, or prevent the sale by the Company of its property as an entirety; provided, however, that any such consolidation, merger or sale shall be on such terms as to preserve and not to impair any of the rights and powers of the Trustees and/or of the holders of the debentures, and that any successor corporation formed by or resulting from such consolidation or merger, or any corporation to which such sale shall be made, shall, as a part and condition of such consolidation or merger, and as a part of the purchase price for the sale of the property of the Company as an entirety,

expressly assume in writing the due and punctual payment of the principal and interest of all of the debentures, and the observance and performance of all of the covenants and conditions of this Indenture, and shall, simultaneously with the consummation of such consolidation, merger or sale, or simultaneously with the delivery to it of the conveyances for the property of the Company as an entirety, if such conveyances be delivered prior to the consummation of such consolidation, merger or sale, execute and deliver [fol. 46] to the Trustee a proper indenture, in form satisfactory to the Trustee, whereby such corporation formed by or resulting from such consolidation or merger or such corporation to which such sale shall be made shall so assume the due and punctual payment of the principal and interest of all of the debentures, and the observance of all of the covenants and conditions of this Indenture.

Section 2. In case the Company shall be so consolidated with or merged into any other corporation, or in case any corporation shall be consolidated with or merged into the Company as aforesaid, or in case of a sale of the property of the Company as an entirety, the corporation formed by or resulting from such consolidation or merger, or to which such sale shall have been made, upon executing and causing to be delivered to the Trustee a proper indenture, whereby such corporation shall assume the due and punctual payment of the principal of, and the interest on, all of the debentures then or at any time thereafter outstanding, and the performance of all the covenants and conditions of this Indenture, shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as party of the first part hereto, and such corporation may thereupon, subject to the provisions hereof, caused to be signed and sealed, and may issue, in its own name or in the name of the Company, any or all of the debentures which shall not theretofore have been signed and sealed by the Company and delivered to the Trustee, and upon the order of such corporation, in lieu of the Company, and subject to [fol. 47] all the terms, conditions and restrictions herein prescribed, the Trustee shall authenticate any and all debentures which shall have been previously signed and sealed by the officers of the Company and delivered to the Trustee for authentication and any debentures which such corporation shall thereafter cause to be signed and sealed and de-

liver to the Trustee for that purpose, and deliver the same to such corporation or upon its order signed by its President or a Vice-President and by its Secretary or an Assistant Secretary. All debentures so issued shall in all respects have the same legal security, rank and validity as the debentures theretofore or thereafter issued in accordance with the terms of this Indenture as though all of the debentures had been actually issued by the Company as of the date of the execution hereof.

Article XI

Definition and Miscellaneous Provisions

* * * * * * *

Signatures and Acknowledgments.

[fol. 48] SCHEDULE B

Reorganization of National Radiator Corporation.

Plan and Agreement Dated February 11, 1931

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee. Armand Erpf, 50 Broad Street, New York City, Secretary. Murray, Aldrich & Webb, 15 Broad Street, New York City, Counsel.

Depositary: Bankers Trust Company, 16 Wall Street, New York City

New York, N. Y., February 11, 1931.

To the holders of 6½% sinking-fund gold debentures, $7 cumulative convertible preferred stock, and common stock of National Radiator Corporation:

National Radiator Corporation (hereinafter called the "Corporation") has defaulted in the payment of the interest due February 1, 1931 on its outstanding Debentures, [fol. 49] the Board of Directors of the Corporation having reached the conclusion that, if the enterprise is to be maintained as a going concern, this interest payment must be omitted, as the continuance of business operations requires the conservation at this time of the cash resources of the Corporation.

The Corporation was formed in August, 1927, as the result of a merger of six companies. Before integration of

the constituent enterprises was perfected, unfavorable competitive conditions in the industry developed, and a drastic decline in residential building construction became apparent, which has since continued. The problem has been further aggravated by the industrial depression. According to estimates of a leading authority on building statistics, expenditures for residential building construction, which is the principal outlet for the products of the Corporation, began to decline in the middle of 1928, and in 1929 declined 30% as compared with 1928, and in 1930, 40% as compared with 1929.

The consolidated net earnings available for interest, after depreciation, since the merger, are reported as follows:

[fol. 50]	1927 (four months)	1928	1929	1930*
Net earnings available for Interest, after depreciation	$993,948	(d) 587,123	(d) 490,371	(d) 740,542
Debenture Interest	271,805	756,378	743,958	713,328
Net after Interest	722,143	(d)1,343,491	(d)1,234,329	(d)1,453,870
Additional charges to surplus	$222,752	658,689	51,451	

(d) Deficit.
* Tentative figures.

[fol. 51] The management of the Corporation has endeavored to meet these conditions, and in 1930 made substantial reductions in costs and overhead; it has been particularly concerned to maintain a liquid working capital position. The tentative balance sheet of the Corporation (not consolidated) as of December 31, 1930, approved as substantially correct by Messrs. Lybrand, Ross Bros. and Montgomery, who are at present engaged in auditing the accounts of the Corporation for the year 1930, is as follows:

Assets

Current Assets:	
Cash in Banks and on Hand	$1,701,899.94
Notes and Accounts Receivable, less Reserve	1,132,563.17
Inventories of Raw Materials, Finished and Semi-finished Stocks at Book Value	2,219,544.19

		$5,054,007.30
Investments at Book Value		67,939.60
Investments in and Advances to Affiliated Companies		458,431.50
Special Deposit Under Sec's Insurance Law, Funds for Redemption of Underlying Bonds, etc.		32,596.69
Real Estate, Machinery, Patterns and Other Equipment, Less Reserve for Depreciation		7,050,692.59
Good Will, Trademarks and Patents		6,634,501.90
[fol. 52]		
Deferred Assets and Prepaid Expenses		136,378.50
		$19,434,548.08

Liabilities

Current Liabilities:		
Accounts Payable		$46,787.60
Taxes and Other Accounts Accrued		151,768.54
Accrued Interest on Debentures		293,339.58
		$491,895.72
Reserves for Redemption of Underlying Bonds, Deferred Notes Payable, etc.		92,009.35
6½% Sinking Fund Gold Debentures Due 1947, Outstanding December 31, 1930	10,831,000.00	
Less Held in Treasury	115,000.00	10,716,000.00
Capital Stock (Stated Value) $7 Cumulative Convertible Preferred Stock (No par value) 58,646 shares outstanding and Common Stock (No par value) 272,708 shares outstanding	10,000,000.00	
Deficit	1,865,356.99	8,134,643.01
		$19,434,548.08

[fol. 53] While the working capital as reported is reasonably ample, it will be apparent that an increasing volume of business, such as the Corporation must anticipate in order to support even the reduced service on its capitalization as readjusted under the following Plan, will require the use of a correspondingly larger amount of cash to carry larger inventories and receivables. In addition, increased expenditures for the design of new products, and for equipment necessary in their manufacture, will be essential to keep the Corporation's competitive position as against other enterprises in the industry. Moreover, the outlook for the immediate future is obscure, with no definite promise of an early recovery in earning power.

Confronted with these problems, the management of the Corporation has sought a solution of the difficulties which would be most advantageous to the holders of the Corporation's securities. It is the firm conivction of the management that a liquidation of the Corporation, either by action of the stockholders or by a forced sale at the instance of the Debentureholders, would, under present conditions, result in a very small payment to Debentureholders and other creditors and might well prove disastrous, and would, in any event, leave nothing for the stockholders. Therefore, it is the view of the management that the only proper course, under the circumstances, is to effect with all possible expedition a reorganization of the Corporation upon a basis which will provide a revised capital structure with drastically reduced fixed charges, and which will permit the employment of the liquid assets in the current conduct of the business.

[fol. 54] To this end, the management (which includes the owners and representatives of owners of substantial amounts of the Debentures and the Preferred and Common Stocks) has requested the undersigned, Rudolph B. Flershem, Charles O. Cornell and John H. Waters, to act as a Reorganization Committee to formulate and submit to the security holders a Plan of Reorganization designed to accomplish the objects recommended by the management. This Committee is in accord with the conclusions of the management as stated above, and, believing that a reorganization of the Corporation may be effectively accomplished at this time, has formulated the following Plan of Reorganization. The Committee has consulted with other holders

of large amounts of the Debentures, who have approved the Plan.

The Plan is recommended by this Committee to your favorable consideration and you are urged to deposit your securities promptly, to insure that the Plan may be declared operative as soon as possible.

The Board of Directors of the Corporation and this Committee are convinced that, unless this Plan is carried out, the only alternative is liquidation which will deprive all security holders of any opportunity to participate in a revival of business following the present depression.

Rudolph B. Flershem, Chairman; Charles O. Cornell, John H. Waters, Reorganization Committee.

[fol. 55]

Plan

I

Present Capitalization and Indebtedness

The Capitalization of National Radiator Corporation (hereinafter called the "Corporation") as of December 31, 1930, is as follows:

	Outstanding
6½% Sinking Fund Gold Debentures due August 1, 1947	$10,716,000
The interest due February 1, 1931, on the above Debentures amounts to $348,270.	
$7 Cumulative Convertible Preferred Stock without par value	58,646 shares
No dividends on this Preferred Stock have been paid since August 1, 1928.	
Common Stock without par value	272,708 shares

II

The New Company

A new corporation or corporations (hereinafter called the "New Company") will be organized with such corporate name and under the laws of such State of the United States as shall be approved by the Reorganization Committee, to acquire the assets and the business of the present Corporation, subject only to such changes as may result from the ordinary course of business, and subject also

to existing liens, charges and encumbrances. In so far as practicable, title to the assets and business so acquired will [fol. 56] be vested in the New Company, but in certain instances it may be deemed advisable to transfer certain of these assets to one or more subsidiary companies, whose entire capital stock (except directors' qualifying shares) will be owned by the New Company.

The capitalization of the New Company, upon the consummation of the Plan, will be approximately as follows:

	Authorized	To be presently outstanding
15-Year 5% Debentures	$5,500,000	$5,358,000
$7 Preferred Stock (no par value)	55,000 shares	53,580 shares
Common Stock (no par value)	400,000 shares*	272,966 shares

*Up to 90,902 shares to be reserved against the exercise of Stock Subscription Warrants.

The New Company will assume and agree to pay in full all liabilities of the Corporation for taxes, wages, services and merchandise, which have not been paid at the time of the acquisition by the New Company of the assets and business of the Corporation.

III

Description of New Securities

The following securities (hereinafter collectively called "New Securities") will be authorized by the New Company:

[fol. 57] 1. 15-Year 5% Debentures (hereinafter called the "New Debentures") will be authorized for the aggregate principal amount of $5,500,000 and will be issued to the extent and upon the terms provided in the Plan. The New Debentures shall be dated March 1, 1931, shall mature March 1, 1946, and shall bear interest from their date, at the rate of 5% per annum, payable annually on March 1 in each year up to and including March 1, 1934, and payable thereafter semi-annually on March 1 and September

1 in each year, but required to be paid prior to the maturity of the principal thereof, only as hereinafter provided out of the New Company's net earnings, as such net earnings shall be more fully defined in the Indenture under which the New Debentures are issued. The interest will be cumulative, but accumulations of interest shall not bear interest. At the maturity of the principal of the New Debentures (whether by their terms or otherwise), all arrears of cumulative interest shall be payable, whether earned or not. The net earnings of the New Company for the calendar years 1931, 1932 and 1933 shall be determined annually by the Board of Directors of the New Company, and up to 40% of such net earnings shall be available for and shall be required to be applied to the payment of the interest on the New Debentures for the first three years, that is up to and including March 1, 1934. Beginning with the calendar year 1934, and in each year thereafter, the net earnings of the New Company shall be determined semi-annually by the Board of Directors, and all of the net earnings in each such year shall be available for and shall be required to be applied to the payment of the interest on [fol. 58] the New Debentures which is payable on September 1 in such year and on the next succeeding March 1, and to the payment of all arrears of cumulative interest. Said Indenture shall provide that no dividends on any class of stock of the New Company shall be paid or set apart for payment unless the interest on the New Debentures payable on the next succeeding interest date, at the full rate of 5% per annum, as well as all cumulative interest in arrears, if any, shall have been paid or set apart for payment.

The New Debentures will be issued under an Indenture to be made to a Trustee designated by the Reorganization Committee, which Indenture shall contain provisions approved by the Reorganization Committee, customary in such an instrument, including a covenant of the New Company that it will not mortgage or pledge any of its assets to secure any funded debt as defined in the Indenture, without simultaneously making provision for securing equally with such funded debt the New Debentures then issued and outstanding. The Indenture may also contain further provisions and restrictions approved by the Reorganization Committee, designed to protect the New Debentures. The New Debentures will be redeemable, as will be more fully

provided in said Indenture, as a whole or in part, on any interest payment date, at 107½% of their principal amount, together with all interest accumulated and accrued thereon to the date of such redemption; but they shall not be redeemed in part so long as any accumulated interest on any of the New Debentures remains unpaid.

[fol. 59] 2. $7 Preferred Stock (hereinafter called "New Preferred Stock") will be authorized for the amount of 55,000 shares without par value, and will be issued to the extent and upon the terms provided in the Plan. The New Preferred Stock will be preferred both as to assets and dividends and the holders thereof will be entitled to receive on voluntary liquidation $115 per share, and on involuntary liquidation $100 per share, plus in each case accumulated and unpaid dividends. The New Preferred Stock will be redeemable as a whole or in part on any dividend date at $115 per share, plus accumulated and unpaid dividends. The holders of the New Preferred Stock shall be entitled to receive preferential dividends at the rate of $7 per share per annum, payable quarterly on January 15, April 15, July 15 and October 15 in each year, when and as declared by the Board of Directors out of funds of the New Company legally available for such dividends. Such dividends shall be non-cumulative up to and including July 15, 1934, but shall be cumulative from and after July 15, 1934, that is to say, the first cumulative dividend will be the quarterly dividend payable on October 15, 1934. It shall be a term of the New Preferred Stock that the authorized number of shares of the New Preferred Stock shall not be increased, and that no additional shares of stock of any class ranking as to assets or dividends prior to or on a parity with the New Preferred Stock shall be authorized or issued by the New Company, without the consent of the holders of at least two-thirds in interest of the outstanding New Preferred Stock.

[fol. 60] The holders of the New Preferred Stock shall be entitled to one vote for each share.

3. Common Stock (hereinafter called "New Common Stock") will be authorized for the amount of 400,000 shares without par value, and will be issued to the extent and upon the terms provided in the Plan. 90,902 shares (or such lesser amount as may be required) of such New

Common Stock will be reserved for the exercise of the Common Stock Subscription Warrants below described.

The holders of New Common Stock shall be entitled to one vote for each share.

4. Common Stock Subscription Warrants (hereinafter called "Stock Warrants"), in form approved by the Reorganization Committee, will be authorized for issuance to the extent required for distribution to the Common Stockholders of the Corporation participating in the Plan. The Stock Warrants will be issued in registered form, and will grant the holder thereof the right to purchase shares of New Common Stock, at any time on or before July 1, 1941, at a purchase price of $20 per share. The Stock Warrants will be issued under an agreement which will contain provisions designed to safeguard the purchase right against dilution resulting from the issuance of additional Common Stock of the New Company, and to preserve such purchase right in the event that the New Company should merge or consolidate with one or more other corporations.

[fol. 61]

IV

Distribution of New Securities

Holders of the 6½% Sinking Fund Gold Debentures, the $7 Cumulative Convertible Preferred Stock and the Common Stock of the Corporation who become parties to the Plan, will be entitled, upon its consummation and the surrender of their Certificates of Deposit in form transferable by delivery, to receive New Securities upon the following basis:

1. Holders of 6½% Sinking Fund Gold Debentures of the Corporation will be entitled to receive, for each $1,000 principal amount of deposited Debentures, $500 principal amount of New Debentures and 5 shares of New Preferred Stock and 20 shares of New Common Stock.

2. Holders of $7 Cumulative Convertible Preferred Stock of the Corporation will be entitled to receive, for each share of deposited Preferred Stock, one share of New Common Stock.

3. Holders of Common Stock of the Corporation will be entitled to receive a Stock Warrant granting the right to

purchase as aforesaid one share of New Common Stock for every three shares of deposited Common Stock of the Corporation, but only upon the payment to the Depositary for the account of the Reorganization Committee of the sum of $1 in cash in respect of each share of New Common Stock covered by such Stock Warrant. No payment will be required of depositors of Common Stock of the Corpora-
[fol. 62] tion at the time of deposit or until the Plan has been declared operative and the Stock Warrants are ready for distribution. After the Stock Warrants are ready for distribution, the Reorganization Committee may fix a date on or before which such payment must be made by depositors of Common Stock, and, upon failure to make such payment within the time so fixed, such depositors will forfeit all rights under the Plan. Stock Warrants will be issued only in respect of even multiples of 3 shares of Common Stock of the Corporation, and fractions arising in respect of less than 3 shares of such Common Stock will be disregarded.

V

Method of Participation

Holders of Debentures and/or Preferred Stock and/or Common Stock of the Corporation, in order to participate in the Plan, must deposit with Bankers Trust Company, as Depositary, at its principal office at 16 Wall Street, in the City of New York, on or before March 15, 1931, or such later date as may be fixed by the Reorganization Committee, their Debentures and the certificates representing their shares of such Preferred Stock and Common Stock.

Stock certificates must be properly endorsed in blank for transfer or be accompanied by proper instruments of transfer in blank. Stock transfer stamps need not be attached, unless the Certificate of Deposit is to be issued in a name other than that of the registered owner of the deposited stock, in which case New York State and Federal stock transfer stamps, each at the rate of 2¢ per share (a
[fol. 63] total of 4¢ per share), must be furnished.

Debentures registered as to principal must be transferred to bearer before being deposited; and all Debentures must be accompanied by the appurtenant interest coupons maturing on and after February 1, 1931. All ref-

erences in the Plan and the annexed Agreement to Debentures shall, unless the context otherwise indicates, be deemed to include said coupons.

For the convenience of depositors in forwarding their securities, the Depositary will supply a form of transmittal letter.

Depositors will be entitled to receive transferable Certificates of Deposit issued by the Depositary under the Plan and the annexed Agreement, and by the acceptance of such Certificates of Deposit, the holders thereof shall be deemed to have assented to the Plan and said Agreement and to all the terms and provisions thereof.

VI

Provisions for Declaring the Plan Operative

The Reorganization Committee in its absolute discretion may determine whether and when a sufficient amount of securities of the various classes of the Corporation shall have been deposited under the Plan to render it advisable to declare the Plan operative. The Reorganization Committee may also declare the Plan abandoned at any time, notwithstanding it may previously have been declared operative, if in the judgment of the Reorganization Committee it is inadvisable or impracticable to carry out the Plan.

[fol. 64]

VII

Modification of Plan

The Reorganization Committee may modify the Plan or adopt a substitute plan, as in the annexed Agreement provided. In the event of any such modification or substitution, a copy of such modified or substituted plan shall thereupon be filed with the Depositary. In case of any modification of the Plan, which in the judgment of the Reorganization Committee shall adversely affect the holders of Certificates of Deposit for securities of any class or classes to any material degree, or in case of the adoption of any substitute plan, notice of such modification or substitution shall be given and the assent thereto of holders of Certificates of Deposit for the class or classes of securi-

ties so affected shall be obtained in the manner and with the effect provided in the annexed Agreement.

VIII

Reorganization Committee and Agreement

Messrs. Rudolph B. Flershem, Charles O. Cornell and John H. Waters have consented to act as a Reorganization Committee to carry out the Plan. The Reorganization Committee shall act by a majority of its members, as provided in the annexed Agreement. The Reorganization Committee shall be entitled to compensation. The expenses of the Reorganization will include the compensation and expenses of the Reorganization Committee and of the Trustee of the 6½% Sinking Fund Gold Debentures, including the fees of their counsel, and the compensation of the De- [fol. 65] positary. All compensation and expenses shall be determined by the Reorganization Committee, as provided in the annexed Agreement.

In furtherance of the Plan, the Reorganization Committee has executed the annexed Agreement, copies of which, with the Plan, are lodged with the Depositary. The Plan and said Agreement shall be deemed and constitute one instrument and depositors under the Plan shall be bound by all the terms of said Agreement, as parties thereto. In the event, however, of any conflict between the provisions of the Plan and said Agreement, the provisions of said Agreement shall control.

IX

Miscellaneous

The form and terms of all charters, certificates of incorporation, by-laws, debentures, indentures, certificates of stock, warrants and other securities of any corporation or corporations and of any other documents used in the Reorganization shall, in all respects not expressly defined by the Plan, be determined by the Reorganization Committee.

No fractional shares of stock of the New Company of any class will be issued and no New Debentures will be issued for less than $100 principal amount. In lieu thereof, fractional scrip may be issued in such form and on such terms and conditions as may be approved by the Reorganization Committee, and, as it may determine, such scrip

may be non-dividend bearing or non-interest bearing; or a cash adjustment may be made in respect of such fractions [fol. 66] on a basis fixed by the Reorganization Committee in its absolute discretion.

The Reorganization Committee shall have power, to be exercised in its absolute discretion, to consent to or arrange for the adjustment, by payment, settlement or purchase, of any and all claims and charges of every nature whatsoever which, in the opinion of the Reorganization Committee, should be adjusted in connection with the consummation of the Plan. The Reorganization Committee may arrange that the expense of any such adjustment shall be borne by the Corporation or the New Company; or, in its discretion, the Reorganization Committee may arrange for the participation in the Plan of any such claims or charges, and for that purpose may use any of the securities presently issuable in the Reorganization and not required for delivery to depositors. All general creditors of the Corporation, if any, other than those dealt with herein, whose claims shall be duly established, unless such claims are otherwise adjusted, shall be entitled, upon the consummation of the Reorganization, to receive new securities upon the same basis as the holders of the existing 6½% Debentures of the Corporation, upon assignment of their claims in form satisfactory to the Reorganization Committee within such period or periods as the Reorganization Committee may prescribe. All estimates of capitalization in the Plan omit consideration of any additional securities which may be issued or used for this purpose.

[fol. 67] No estimate, statement, explanation or suggestion contained in the Plan or the annexed Agreement or in any notice, circular or communication issued, or which may hereafter be issued, by the Reorganization Committee or by the Depositary or by the Corporation or by any of its officers or directors, is intended to be, or is to be accepted as, a representation or warranty or as a condition of deposit or assent under the Plan and said Agreement, and no error, defect or irregularity herein or therein, except by written consent of the Reorganization Committee, shall release any deposit under the Plan or said Agreement or affect or release any assent hereto or affect or release any payment made or action taken pursuant hereto.

Dated February 11, 1931.

[fol. 68] SCHEDULE "B" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

against

NATIONAL RADIATOR CORPORATION, Defendant

Answer

To the Honorable the Judges of said Court:

In answer to the Bill of Complaint in the above entitled case, National Radiator Corporation, the defendant above named, admits the truth of the allegations therein contained, joins in the prayers thereof, and consents to the appointment of a receiver or receivers as therein prayed for.

This answer is filed pursuant to a resolution of the Executive Committee of said defendant corporation adopted at a meeting of said Committee duly called and held on the 8th [fol. 69] day of October, 1931, a certified copy of the said resolution being annexed hereto.

National Radiator Corporation, by Chas. L. Crouse, Vice-President. Attest: Carl E. Resley, Secretary. H. S. Endsley, Johnstown, Pennsylvania, Solicitor for the Defendant.

Whereas, a bill of complaint has been filed in the District Court of the United States for the Western District of Pennsylvania by Rudolph B. Flershem, et al., as a Reorganization Committee, complainants, against National Radiator Corporation, defendant, praying inter alia for the appointment of receivers of all the property and assets of the corporation for the protection of the creditors of the corporation, and a subpœna in such action has been duly served upon this corporation; and

Whereas, the corporation has been advised that ancillary bills of a similar character will be filed in other jurisdictions throughout the United States where this corporation owns properties; and

Whereas, it is the judgment of the directors of the corporation that it is for the best interests of the creditors and stockholders of the corporation that receivers be appointed as aforesaid;

[fol. 70] Now, Therefore, Resolved, That H. S. Endsley, Esquire, be authorized to enter an appearing for this corporation in said proceeding and that the answer of the corporation to the bill of complaint be executed on behalf of the corporation by any executive officer under the corporate seal attested by the secretary, and filed, admitting the truth of the allegations contained in the bill and joining in the prayers thereof, and consenting to the appointment of a receiver or receivers for the corporation;

Further Resolved, That H. S. Endsley, as counsel, is hereby authorized to select counsel in the various jurisdictions where any such ancillary bills may be filed, and to authorize and instruct counsel so selected to appear and to file on behalf of the corporation in any and all such ancillary causes answers similar to the answer hereby authorized to be filed in the principal cause in the Western District of Pennsylvania.

Further Resolved, That the officers of the corporation and H. S. Endsley, its counsel, are hereby authorized to do, or cause to be done, all such acts and things, and to execute, sign, and file all such papers, as may be necessary to carry out the intent of the foregoing resolutions.

Certificate

I, the undersigned, —— ——, Secretary of National Radiator Corporation, do hereby certify that the foregoing is a [fol. 71] true and correct copy of recitals and resolutions adopted by the Board of Directors of said corporation at a meeting of said Board duly called and held in the City of Johnstown, Pennsylvania, on the eighth day of October, 1931.

—— ——.

SCHEDULE "C" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2558

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, and Frank B. Cahn, as the Reorganization Committee Constituted under the Plan and Agreement Dated February 11, 1931, for the Reorganization of National Radiator Corporation, Complainants,

against

NATIONAL RADIATOR CORPORATION, Defendant

Decree Appointing Receiver

And now, to-wit, this 9th day of October, 1931, this matter came on to be heard on bill and answer, and upon consideration thereof, on motion of counsel for complainants, the defendant appearing and consenting thereto, it is or- [fol. 72] dered, adjudged and decreed as follows:

First. The defendant, National Radiator Corporation, being presently unable to meet and discharge its obligations which have already matured, without seriously jeopardizing the ability of the defendant to continue in business, it is to the interest and advantage of the creditors and stockholders of the defendant that a receiver be appointed for all its assets.

Second. That Robert S. Waters, of Johnstown, Pa., and William G. Heiner, of Pittsburgh, Pa., be and hereby are appointed Receivers of all and singular, the lands, tenements and hereditaments of the defendant and all its real and personal property, business, rights, estates, and effects whatsoever, wheresoever the same may be situate, including its merchandise, stocks and bonds, choses in action, bills and accounts receivable, cash in hand and in bank, and all its easements, franchises, rights, privileges, and interests, and all of the tolls, earnings, rents, issues, profits, revenues and income thereof and every part thereof.

Third. The said Receivers are hereby authorized to take possession of all and singular the property, business, assets

and effects above described or referred to, wheresoever situate, and until further order of this Court, said Receivers shall manage and control said property and shall preserve the property, assets and effects in proper condition and repair so that they may safely and advantageously be used and shall fully protect the same and employ such persons [fol. 73] and make such payments and disbursements as may be necessary or proper for so doing, and shall report their actions to this Court from time to time.

Fourth. The said Receivers shall have full power to demand, sue for and collect, receive and take into their possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the defendant and to institute suits at law or in equity for the recovery of any assets, property damages or demands existing in favor of said corporation, and in their discretion to compound and settle with any debtors of said corporation, with persons having possession of its property or in any way responsible at law or in equity to said corporation at the time of this appointment or afterwards, upon such terms and in such manner as they may deem just and beneficial to ~~said~~ corporation. Said receivers are hereby further authorized to intervene in and become a party to such suits, actions and proceedings, at law or in equity, including ancillary proceedings in state or federal courts, as may, in their judgment, be necessary or proper for the protection, maintenance or preservation of the receivership estate, or any part thereof, or in aid of the decrees or ordered entered or made by this Court, and to apply to any such court for any such order or orders as may be deemed by them necessary or proper.

Fifth: It is further ordered, adjudged and decreed that the defendant and each of its officers, agents, directors and employees be, and they are hereby required to transfer, [fol. 74] convey and turn over to the Receivers, or their duly constituted agent, all of the real and personal property, business, assets and effects above described or referred to, and all of the property and assets of the defendant, and all books, papers and other personal property belonging to the defendant in their or its hands or subject to their or its control.

Sixth. It is further ordered that the defendant, its agents, directors, officers, servants and employees and all other persons, be and they are hereby enjoined and restrained from in any way levying upon, attaching, selling, disposing, transferring or in any manner interfering with any of the property of the defendant or from taking possession of or in any way interfering with any parts thereof or from in any manner disturbing or interfering with the possession or management of any part of said property over which the said Receivers are hereby appointed, and doing any act or thing to prevent the discharge by said Receivers of their duties under this decree.

Seventh. Until the further order of this Court, said Receivers shall continue to carry on the business of the National Radiator Corporation, the defendant, to continue the manufacture and sale of its products, to dispose of its stock on hand, make such purchases as may be necessary to enable it to carry on its business, complete such contracts and orders of the defendant as in the judgment of the Receivers may be advantageous and for the best interests of the defendant and its creditors, and make, accept and carry [fol. 75] out such new contracts and orders as in their judgment may be advisable; and said Receivers are further vested with full discretion in the matter of handling the present business of the defendant and any new business which may be taken and accepted by them and to handle the same in accordance with the customs of the business and the trade in which the defendant is engaged. Said Receivers shall have full power and authority to sell and discount negotiable instruments of customers or customers' invoices and to endorse the same.

Ninth. Said Receivers shall be, and hereby they are, allowed four months from the date of this decree (unless the time be extended by further order of this Court) within which to elect to adopt or continue in force, or to refuse to adopt or continue in force, any lease or other contract of whatsoever character not fully performed which may be included in the property or assets of the defendant or which shall have been entered into by the defendant. Said election may be made from time to time and shall be made by an instrument in writing subscribed by said Receivers and filed in the office of the Clerk of this Court, and no

conduct or uses of the rights by said Receivers or payments made or received by them, as rent or otherwise, or any other acts or omissions of said Receivers within said period of four months unaccompanied by the filing of such written instrument shall be deemed to conclude said Receivers in respect of such election or be deemed to constitute an election to adopt or to continue in force any such contract, lease or agreement.

[fol. 76] Tenth. Said Receivers shall open books of account and shall keep, or cause to be kept, therein due and proper accounts of all earnings, expenses, receipts and disbursements of and with respect to the properties and assets in their possession or under their control, the conduct of said business and the conduct or carrying on of any other business or undertaking which said Receivers hereby are or hereafter shall be authorized to conduct or carry on; shall preserve proper vouchers for all payments made by them on account thereof; and shall deposit all funds coming into their hands in such banks as shall be selected by them and approved by this Court.

Eleventh. The right is reserved to the parties hereto or to any and all other parties in interest, to apply to this Court for any other instructions to said Receivers, and the Court reserves the full right and jurisdiction to make from time to time such further orders, amplifying, extending, limiting or otherwise modifying this decree, as to it may at any time seem proper, and in all respects and at all times to regulate and control the conduct of said Receivers.

Twelfth. In case of the death, resignation or inability of the Receivers hereby appointed, or either of them, and the appointment of a successor or successors, the provisions of this decree shall be applicable to such successor or successors from and after his or their said appointment without further order of this Court and with like effect as if such successor or successors were herein specifically named as said Receiver or Receivers.

[fol. 77] Thirteenth. Said Receivers shall, before entering upon the discharge of their duties, file a bond, with

a surety to be approved by this Court, in the sum of Fifty Thousand ($50,000) Dollars, conditioned for the faithful discharge of their duties as such Receivers.

Per Curiam:

G.

Certified from the record this 9 day of Oct. 1931.
J. Wood Clark, Clerk. (Seal of U. S. District Court, W. D. Pennsylvania.)

IN UNITED STATES DISTRICT COURT

In Equity. No. 2597

MOTION TO DISMISS—Filed Jan. 19, 1932

Now come the above-named defendants, Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation, and hereby move this Honorable Court to dismiss the above-entitled action and to dismiss the complainant's bill of complaint herein, on the ground that it appears on the face of said bill of complaint that it does not state facts sufficient to constitute a cause of action and is wholly without equity, [fol. 78] and for such other relief as may be proper, together with the costs of this motion.

Dated January 19, 1932.

Reed, Smith, Shaw & McClay, Solicitors for the Above-named Defendants, Reorganization Committee, Union Trust Building, Pittsburgh, Pennsylvania.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed Jan. 19, 1932

Now comes the above named defendant, National Radiator Corporation, and hereby moves this Honorable Court to dismiss the above entitled action and to dismiss the Com-

plainant's Bill of Complaint herein, on the ground that it appears on the face of said Bill of Complaint that it does not state facts sufficient to constitute a cause of action and is wholly without equity, and for such other relief as may be proper, together with the costs of this Motion.

Dated January 19, 1932.

H. S. Endsley, Solicitor for National Radiator Corporation, Defendant, Suite 1102, First National Bank Building, Johnstown, Pennsylvania.

[fol. 79] In United States District Court

Motion for Stay of Proceedings—Filed March 29, 1932

Now comes the above named complainant, Lily Clapier, and hereby moves this Honorable Court to stay all proceedings in the cause now pending in this Honorable Court, wherein Rudolph B. Flershem, Charles O. Cornell, John H. Waters and Frank B. Cahn, as the Reorganization Committee constituted under the Plan and Agreement dated February 11, 1931, for the Reorganization of National Radiator Corporation are the complainants and National Radiator Corporation is defendant; until the final determination of this cause, brought by the complainant, to vacate and set aside the decree in the action aforesaid and to dismiss the complaint therein on the ground that the failure to do so may be prejudicial and inimical to the interests of the complainant.

Dated March 29th, 1932.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Attorneys for Lily Clapier, Complainant.

In United States District Court

Opinion—Filed May 31, 1932

Gibson, District Judge:

This action has been brought by the plaintiff to secure the vacation of all orders made in pursuance of a bill in [fol. 80] equity filed in this Court against the National Ra-

diator Corporation by the other defendants herein. The plaintiffs in that suit were a committee representing more than 95% of the holders of a very large debenture bond issue of the defendant. The bill set forth a default in payment under the debenture issue agreement and threats of many suits on the part of bondholders. It prayed the appointment of a receiver and the ultimate sale of the property under the order of the Court. The bill was specifically stated to be for the purpose of bringing about a reorganization of the defendant company, and set out a proposed plan of reorganization, differing in no essential respect from the ordinary reorganization bill. The defendant filed its answer admitting the allegations of the bill. Shortly after the suit was instituted the Bankers Trust Company of New York, Trustee under the bond issue, intervened as a party plaintiff, alleging a judgment against the defendant for the amount of the issue, with accrued interest. And later, the First National Bank of Cincinnati, a bondholder whose interest was identical with that of plaintiff in the instant action, was allowed to intervene as a party defendant. Receivers were appointed pursuant to the prayer of the bill.

The present plaintiff did not seek to intervene in the proceeding mentioned, but has filed the present bill. She is the holder of bonds of the Radiator Corporation of the amount of $11,000, the total bonds outstanding being in amount of more than $10,000,000. The plaintiff, in effect, asserts a lack of jurisdiction of the court to entertain the bill attacked by plaintiff, and charges a conspiracy by the parties to the original suit to defraud the present plaintiff [fol. 81] and others in like situation.

The parties to the original suit have moved to dismiss the bill in the instant case, alleging that it fails to set forth facts sufficient to constitute a cause of action.

An examination of the bill of complaint has convinced us that the motions of the defendants should be sustained. The bill is couched in the most general terms and, which charging improper collusion between the defendants, sets out nothing in a specific way from which any fraud upon complainant is to be inferred.

Incidently, we may say that we have heard like charges in the original case (No. 2558 In Equity), but the evidence did not tend to sustain them. We shall this day file a decree

in that case. The evidence indicates that the primary suit was along conventional lines. See Continental &c. Trust & Savings Bank v. Allis-Chalmers Co., 200 Fed. 600; In re Babcock, 26 Fed. (2) 153; Re Metropolitan Railway Receivership, 208 U. S. 90; Horn v. Pen Marquette R. Co., 151 Fed. 626; Guaranty Trust Co. v. C., M. & St. P. Ry. Co., 15 Fed. (2d) 434.

We are entirely satisfied that the original case was within the jurisdiction of the court, and that the appointment of receivers therein was justified.

The instant bill will be dismissed. In arriving at this result we have not considered the question of our jurisdiction to entertain the present bill, wherein citizens and residents of the same state as that of the plaintiff are joined with others as defendants.

[fol. 82] In United States District Court

Decree

And now, to wit, May 31, 1932, the motion of the defendants to dismiss the bill of complaint in the above entitled matter having come on to be heard, upon consideration thereof, it appearing to the Court that said bill does not state facts constituting a cause of action, and is without equity, it is ordered, adjudged and decreed that said bill of complaint be, and the same hereby is, dismissed,

Per Curiam:

G.

And now to wit, July 5, 1932, upon request of counsel for plaintiff, an exception is noted to the order dismissing the bill of complaint, and bill sealed.

R. M. Gibson, District Judge. (Seal.)

In United States District Court

Petition for Appeal—Filed July 12, 1932

To the Honorable the Judges of said Court:

The complainant, Lily Clapier, conceiving herself aggrieved by the decree made and entered on the 31st day of May, 1932, in the above entitled case, dismissing the com-

plainant's Bill of Complaint, hereby appeals therefrom to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the Assignments of Error filed herewith, and she prays that this appeal may be allowed; that a citation be issued directed to the above named defendants, commanding them to appear before the said United States Circuit Court of Appeals for the Third [fol. 83] Circuit to do and receive what may appertain to justice to be done in the premises; that a transcript of the record, proceeding and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an order be made fixing the amount of the cost bond which said complainant shall give and furnish upon said appeal.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Complainant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Now, to wit, July 12th, 1932, the foregoing petition of Lily Clapier, the complainant, having been presented in open court, and it appearing to the court that the petitioner has filed her Assignments of Error, it is ordered and decreed that an appeal be, and the same hereby is, allowed to the United States Circuit Court of Appeals for the Third Circuit from the decree entered in the above entitled case on May 31st, 1932; that a citation be issued, directed to the above named defendants, commanding them to appear before the said United States Circuit Court of Appeals for the Third Circuit; that a transcript of the record, proceedings and papers upon which said decree was made be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit; and that an appeal bond for costs be given in the sum of $500.00.

Nelson McVicar, District Judge.

[fol. 84] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed July 12, 1932

Now comes Lily Clapier, the complainant herein, by her solicitors, and, having prayed an appeal from the decree

entered in this cause on May 31st, 1932, dismissing the complainant's bill of complaint, respectfully shows that said decree is erroneous, and should be reversed and set aside, for the following reasons:

1. The District Court erred in entering a decree dismissing the bill of complaint, the said decree and the exception thereto being as follows:

"Decree

And now, to wit, May 31, 1932, the motion of the defendants to dismiss the bill of complaint in the above entitled matter having come on to be heard, upon consideration thereof, it appearing to the Court that said bill does not state facts constituting a cause of action, and is without equity, it is ordered, adjudged and decreed that said bill of complaint be, and the same hereby is, dismissed.

Per Curiam: G.

And now, to wit, July 5th, 1932, upon request of counsel for plaintiff, an exception is noted to the order dismissing the bill of complaint, and bill sealed.

Robert M. Gibson, District Judge. (Seal.)"

[fol. 85] 2. The District Court erred in holding that the bill of complaint does not state facts constituting a cause of action.

3. The District Court erred in holding that the bill of complaint is without equity.

4. The District Court erred in refusing to grant to the complainant the relief prayed for in the bill of complaint.

Wherefore, and in order that the foregoing Assignments of Error may be and appear of record in this cause, the complainant herein presents the same to this court, and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided; and the complainant further prays that said final decree may be reversed and the District Court be directed to enter a decree in this cause in conformity with the prayer of the bill of complaint, or in such form as the United States Circuit Court of Appeals for the Third Circuit shall deem just.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Complainant.

IN UNITED STATES DISTRICT COURT

APPELLANT'S PRÆCIPE FOR RECORD ON APPEAL—Filed July 25, 1932

To J. Wood Clark, Clerk:

Please incorporate the following portions of the record into the transcript on the appeal in the above entitled case:

[fol. 86] 1. Copy of the docket entries.

2. The Bill of Complaint, together with the following exhibits referred to therein:

(a) Schedule "A," being the Bill of Complaint in the suit of Rudolph B. Flershem et al., as the Reorganization Committee, etc., Complainants, vs. National Radiator Corporation, Defendant, at No. 2558 In Equity, of this court, together with the following portions only of Schedule "A" (Indenture, dated August 1st, 1927) and of Schedule "B" (Plan and Agreement of Reorganization, dated February 11th, 1931) attached thereto:

Portions of Schedule "A,"—Indenture dated August 1, 1927,—to be printed:

Cover.

First two paragraphs on page 1.

Title only of Article I on page 8, viz: "Article I, Description, Execution, Exchange and Registration of Indenture."

Title only of Article II on page 14.

Title only of Article III on page 31.

Title only of Article IV on page 42.

The whole of Article V, beginning with the title on page 52 and ending with Section 9 of said Article, on page 60, inclusive.

Title only of Article VI on page 60.

Title only of Article VII on page 61.

Title only of Article VIII on page 62.

Title only of Article IX on page 68.

The whole of Article X, beginning with the title, on page 69, and including Sections 1 and 2 of said Article.

[fol. 87] Title only of Article XI on page 71.

The words: "Signatures and acknowledgments."

Portions of Schedule "B,"—Plan and Agreement dated February 11th, 1931,—to be printed:

Cover.

Pages 1 to 11 inclusive.

(b) Schedule "B," being the Answer filed by the defendant in said suit at No. 2558, In Equity.

(c) Schedule "C," being the Decree Appointing Receiver, entered in said suit at No. 2558, In Equity.

3. Motion of the defendants, Rudolph B. Flershem et al., as the Reorganization Committee, etc., to Dismiss the Bill of Complaint.

4. Motion of the defendant, National Radiator Corporation, to dismiss the Bill of Complaint.

5. Complainant's Motion for Stay.

6. Opinion and Decree of this court entered on May 31st, 1932, dismissing the Bill of Complaint, together with the complainant's exception to said Decree.

7. Petition and Order for this Appeal.

8. Assignments of Error.

9. This Præcipe and the Acceptance of Service thereof.

Netter, Palley & Netter, A. H. Kaufman, Sachs & Caplan, Solicitors for Complainant.

[fol. 88] Acceptance of Service

Service of the above Præcipe for Record on Appeal accepted this 20th day of July, 1932.

Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for Appellees Flershem et al., as the Reorganization Committee. H. S. Endsley, Solicitor for Defendant National Radiator Corporation.

July 22, 1932.

In United States District Court

Appellees' Præcipe for Record on Appeal—Filed July 28, 1932

To J. Wood Clark, Clerk.

Sir: In paragraph 2 (a) of appellant's præcipe for record on appeal you are directed to incorporate in such record the Bill of Complaint in the suit of Rudolph B. Flershem, et al., as the Reorganization Committee, etc., Complainants,

vs. National Radiator Corporation, Defendant, at No. 2558 In Equity of this Court, together with certain portions only of Indenture dated August 1, 1927, annexed to said Bill of Complaint and referred to as Schedule "A."

In addition to the portions of said Indenture directed as aforesaid, by the appellant to be incorporated in the record [fol. 89] on appeal herein, you are requested on behalf of the appellees to incorporate in said record the following portions of said Indenture:

All of Section 6, being pages 11, 12 and 13.

All of pages 1 to 7, inclusive, and the first one-third of page 8 down to the beginning of Article I.

Reed, Smith, Shaw & McClay, Solicitors for Defendants-Appellees.

July 28, 1932.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 90] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1932

Lily Clapier, Appellant,

vs.

R. B. Flershem et al., Reorganization Committee of National Radiator Corp., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

Order Assigning Judges—Filed Dec. 14, 1932

And now, towit, this 14th day of December, A. D. 1932, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, and Hon. William H. Kirkpatrick, District Judge for the Eastern District of Pennsylvania, be, and they are hereby, assigned to sit in above case in order to make a full court.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 91] Minute entry of argument and submission, December 14, 1932, omitted in printing.

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 4959, 5020, October Term, 1932

DUDOLPH B. FLERSHEM et al., Committee for the Reorganization of National Radiator Corporation, and Bankers Trust Company, Trustee,

v.

NATIONAL RADIATOR CORPORATION, Defendant, and FIRST NATIONAL BANK OF CINCINNATI and International Heater Company, Intervening Defendants and Appellants

No. 4956, October Term, 1932

LILY CLAPIER, Appellant,

v.

RUDOLPH B. FLERSHEM et al., Appellees

No. 5037, October Term, 1932

JOSEPHINE RAMSEY et al., Appellants,

v.

RUDOLPH B. FLERSHEM et al., Appellees

[fol. 93] No. 5040, October Term, 1932

EDWARD J. RAMSEY, Appellant,

v.

RUDOLPH B. FLERSHEM et al., Appellees

Appeals from the District Court of the United States for the Western District of Pennsylvania

Before Woolley, Circuit Judge, and Dickinson and Kirkpatrick, District Judges

OPINION—Filed March 24, 1933

WOOLLEY, Circuit Judge:

The National Radiator Corporation was engaged in the manufacture and sale of radiators, boilers and other in-

strumentalities of radiation. It was organized in 1927 by the consolidation or merger of six independent companies in the radiator industry. Preliminary to the consolidation an appraisal of their assets was made in the sum of $26,192,000 (speaking for convenience always in round numbers). Upon the basis of this appraisal and a showing of earnings of the constituent companies for the previous four years in sums between $2,456,000 and $3,488,000 a year, the new corporation, with $2,972,000 in cash and current liabilities of $1,478,000, issued $12,000,000 Gold Sinking Fund Debentures, bearing 6½ per cent. interest, of which $10,[fol. 94] 705,000 became outstanding. It also issued 60,000 shares of $7.00 Cumulative Convertible Preferred Stock and 270,000 shares (no par value) of common stock at an estimated value of $11,500,000, making total liabilities to securityholders of all grades of about $23,000,000. Neither then nor later did it place mortgage liens upon its properties.

With this capital structure, completed in August 1927, the new corporation embarked in business and earned $993,000 in the last four months of that year. In 1928, however, the construction of residential, commercial and industrial buildings throughout the country, on which the business of the corporation was dependent, began to fall off. Immediately unfavorable competitive conditions developed. Construction work continued to decline, causing the corporation to suffer in each of the three years succeeding its organization an average deficit of $600,000 before interest on the debentures or a deficit of $1,310,000 after interest but before sinking fund charges. In this situation, which was becoming progressively worse, the corporation defaulted in interest on the debentures due February 1, 1931, though unquestionably having in hand more than enough money to pay it. A Reorganization Committee, being appointed, set to work and evolved a plan to which we shall advert presently. To this plan about 96 per cent. of the securityholders assented. About 3 per cent. stood silent and 1 per cent. objected. This took time. Another interest payment came due August 1, 1931, on which the corporation defaulted. It defaulted also on its sinking fund obligation, though having enough money in hand to pay the former and partially, if not wholly, to meet the latter. During these successive defaults the corpora-

tion was, naturally enough, harassed by suits and threats of suits. To prevent waste in the creditors' race of diligence and to protect securityholders, the members of the [fol. 95] Reorganization Committee, on October 1, 1931, filed a bill in the District Court praying for the appointment of receivers. Their prayer was granted.

The receivers, nine or ten months after their appointment, asked the court for an order authorizing them to sell all the assets of the corporation at a judicial sale for an upset price to be named by the court and under terms of the Reorganization Plan. The plain purpose of the application was to dispose of the corporation's assets in a manner which would conserve and hold them as a going concern for the protection of the senior securityholders.

The Court made such an order. In August, 1932, the receivers sold all the assets on the bid of the Reorganization Committee and the court confirmed the sale. The position of the objecting securityholders (now appellants) is that, assuming but never conceding its jurisdiction to order and confirm the sale, the court erred in fixing the upset price of $2,500,000 and in confirming the sale for $2,550,000.

On the motion for an order of sale the learned trial judge set about to fix an upset price by determining the fair market value of the assets, an almost insuperable task when considered with respect to their character, the feeble market for some of them and, in these extraordinary times, an entire absence of a market for others. He had before him book values of upwards of $18,000,000 which, manifestly, were values out of all relation to the actualities. He was dealing with a proposed sale in the midst of a great business depression and therefore was concerned with selling values; doubtless realizing that, ordinarily, a thing is worth only what it will fetch. He called upon all parties for evidence on the subject. The complainants, at a hearing lasting four days, produced a mass of facts, figures and opinions; the objecting securityholders produced nothing. On the uncontradicted evidence, which was all he had to go [fol. 96] on, the learned judge set an upset price for all assets of the corporation at $2,500,000, or $200,000 more than the highest figure the witnesses had given of what might be expected in liquidation.

We have at much labor studied and absorbed this record. A recital of the mass of facts and figures would add nothing

to the decision of the case. It will be sufficient to say that, notwithstanding what on first view is a startling disparity between book values and market values, we cannot find on the evidence that the learned judge erred in naming the price in the order of sale. If the upset price of $2,500,000 reflected the fair market value of the assets, we cannot find on the assignment charging error in confirming the sale that the purchase price of $2,550,000 was inadequate. At this figure, the purchase price was two per cent above the upset price and ten per cent above the highest price the evidence indicated as likely to be realized in liquidation.

The assignments charging error in the order of sale and the order of confirmation are dismissed.

The law of the case arises out of a demand by the appellant-securityholders that they be paid and, to that end, the corporation be put in liquidation, and out of their challenge of the jurisdiction of the court to appoint receivers and order a sale of assets under the proposed plan of reorganization which they say was devised by certain securityholders and officials of the corporation and the trustee for the debentures in fraud of other securityholders.

We shall briefly dispose of the last question—collusion and fraud—by giving our judgment, which is in complete accord with the finding of the learned trial judge, that while the evidence shows consultation and co-operation between these several parties in formulating the plan it does not disclose collusion or fraud.

[fol. 97] We have now reached the central question in the case, that of jurisdiction of the court to entertain the bill for receivers. It is pertinent to note the bill did not say the corporation was insolvent. That, in effect, was a tacit admission or declaration of its solvency. The corporation, by its answer, admitted the truth of all allegations of the bill.

Concededly, the corporation was solvent in the sense of having fluid assets enough to pay its debts then due in the usual course of trade—without giving thought to the consequences. It was perhaps not then known, as was subsequently proved, that the corporation was insolvent within the definition of the Bankruptcy Act (Section 1, cl. 15), where "the aggregate of (its) property * * * (was) not, at a fair valuation, sufficient in amount to pay (its) debts". Whatever may have been the corporation's con-

dition as to solvency at the time of bringing the action, clearly the bill was filed on the assumption of its solvency, yet on the need of a conservation receivership for the protection of securityholders, who ranked as creditors. Although after the appointment of receivers and before sale of the assets, the Bankers Trust Company, trustee for the debentures, brought two suits against the corporation, one for interest in arrears, the other for the principal of the debentures, and obtained judgments in the aggregate amount of $11,674,000, thereby indicating, as a practical matter, that the corporation was then insolvent within any of the definitions, we shall continue to regard the receivership according to the tenor of the bill, as one for conservation of assets. In this connection it should be noted as bearing on the court's jurisdiction that the complainants in the bill were not judgment creditors. The respondent corporation, however, tacitly waived that fact and expressly consented to the decree. The Pusey & Jones Company v. Hanssen, 261 U. S. 491, 497; Shapiro v. Wilgus, 287 U. S. [fol. 98] p. 348. Thereafter the Bankers Trust Company, plaintiff in the two judgments and then a judgment creditor of the corporation, was allowed to intervene as party-plaintiff in this case and thenceforward participated in its prosecution.

The appellants' attack on the jurisdiction of the court to entertain the bill, appoint receivers and order a sale of assets as an entirety is disclosed by the three questions they have presented:

(1) "May a federal court of equity, in the absence of other equitable grounds, take jurisdiction of a foreign corporation which is solvent and able, in regular course, to pay its obligations in full, for the primary purpose of reorganizing it?"

(2) "May a federal court of equity, in the absence of other equitable grounds, and solely for the purpose of reorganizing a corporation which is not insolvent nor in imminence of insolvency appoint receivers to take possession of such corporation's property until it can be sold?"

The plain answer to these questions is "no."

The phrase "in the absence of other equitable grounds" compels this answer because it excludes the essence of the

court's jurisdiction in such matters. It is the presence of equitable grounds calling for relief in equity which gives the court jurisdiction. A court of equity is not a forum of convenience to be used by a corporation merely to straighten out its business difficulties or to rebuild its financial structure. Nor is it a place of refuge to which debtors may go for protection against their creditors and against the remedies of suit, judgment, execution and sale which the law affords them. Debtor corporations are not wards of chancery. There is nothing in the mere fact of a corporation's indebtedness, nor in its inability to pay, nor in its wish to make some composition with its creditors that confers equitable jurisdiction upon a court. It is only when [fol. 99] there is something in a situation which sets up an equitable right and admits of equitable relief that parties may go into a court of equity and assert one and obtain the other. Common instances are where a corporation is insolvent or where its insolvency is imminent. Even in the latter case the right of a federal court of equity (cautiously exercised) to appoint receivers at the instance of simple contract creditors if the debtor corporation consents, is not, as one of the appellants admits, debatable. Michigan v. Michigan Trust Company, 286 U. S. 334; Shapiro v. Wilgus, 287 U. S. p. 348.

The appellants' third question, however, contains no nullifying exceptions and goes directly to the point. It is:

(3) "Does the bill of complaint in the primary cause set forth facts sufficient to constitute a cause of action for the appointment of receivers or for other equitable relief?"

The bill must, as we have stated, have equity, and equity will not lie in the mere fact, if such were the case, that the corporation could not pay interest. Here the corporation could presently pay, but payment foretold imminent consequences disastrous to the corporation and, what is more to the point, disastrous to its securityholders. Plainly those consequences were insolvency with its attendant evils to all concerned. The fact that the corporation had in hand sufficient money to meet certain current indebtedness did not alter the underlying conditions. Continental & Commercial T. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 613; In re Babcock, 26 Fed. (2) 153. The facts of the situation, showing, as we find, imminence of insolvency and collapse, call-

ing for protection of creditors, constituted a ground of equity for which relief could validly be asked by simple contract creditors within the law of The Pusey & Jones Com-
[fol. 100] pany v. Hanssen, 261 U. S. 491 and within the warning of Shapiro v. Wilgus, 287 U. S. p. 348. The case therefore falls within the rule distinguished and succinctly stated by Judge Learned Hand in Luhrig Collieries Co. v. Interstate Coal & Dock Co., 281 Fed. 265, 268, 269. There he showed that a bill of the character of this one, filed by simple contact creditors, is an evolution out of the judgment creditors' bill to supplement the writ of execution, of which a court of equity may, with caution, assume jurisdiction with the consent of the debtor corporation. Re Metropolitan Railway Company, 208 U. S. 90. He then said:

"But if it appears that the assets of every kind are not enough to pay all creditors, if left to a general welter of attachments, executions, and separate creditors' bills, a different situation is presented. The corporation may well be solvent if it assets be nursed along, and insolvent if they be thrown to the creditors for piecemeal sale. Recognizing in such event that creditors' bills will in the end be necessary, though unsuccessful, equity will anticipate them by presently stepping in, in the interest of securing the greatest possible payment ratably for all creditors, since the protection of creditors is an interest of equity as well as law."

We find that on the bill, and on the evidence to which we cannot close our eyes, the court had jurisdiction.

The remaining question is whether the holders of old debentures, 96 per cent assenting, should be required to take new securities under the plan. The answer to this question depends on whether the proposed distribution of the new securities, as to character and quantity, is fair?

On the first question the appellants insist that holders of debentures, being "creditors, must be paid in full before
[fol. 101] any interest in the new company can be given to the stockholders of the old corporation," citing Northern Pacific Railway v. Boyd, 228 U. S. 482, or, failing payment, there should be imposed against the property of the corporation liens for the full amount of their claims. As the appellants have no greater right to liens than to payment,

we shall limit our discussion to their claim for payment. If by the expression "paid in full" they mean that the debenture holders must be paid in cash, the Boyd case is not authority for that position. If they mean that, as non-assenting securityholders, they cannot be required to take securities in the new corporation which fairly represent in value and preference securities they hold in the old corporation, Phipps v. Chicago, R. I. & P. Ry. Co., 284 Fed. 945, 949 and Boyd case itself (508) are authorities against them. St. Louis & San Francisco Ry. Co. v. McElvain, 253 Fed. 123; P. R. Walsh Tie & Lumber Co. v. Missouri Pacific Ry. Co., 280 Fed. 38, 44; Temmer v. Denver Tramway Co., 18 Fed. (2d) 226.

In the case of Northern Pacific v. Boyd, where common stock in an old corporation was exchanged for common stock in a new one to the exclusion of creditors, the court held that a transaction in which stockholders are preferred to creditors is invalid. In the instant case holders of common stock in the old corporation will, under the plan, be given nothing in the new corporation. They will, however, be accorded the right to buy, for $1.00, a stock warrant for each three shares of old common stock they may own. One stock warrant gives them the right to buy, before July 1, 1941, on share of new common stock at $20. The stock warrant, when bought and issued, is not a security of the corporation; it is rather a chip giving a right to gamble. Thus holders of old common stock, who, seemingly, are not complaining, stand aside, leaving the holders of old debentures [fol. 102] and old preferred stock as the only ones to be considered in determining whether the proposed distribution is fair.

The proposed plan of distribution was evidently made on the theory that the assets of the corporation, represented by new securities, belong to creditors rather than to the corporation, Coriell v. Morris White, Inc., 54 Fed. (2d) 255, and belong particularly to senior creditors. It is manifest that the new corporation, as in the case of the old one, could not continue business in these times and survive periodical fixed interest charges. Earnings necessary to that end were not and, for a time, may not be forthcoming, hence the provision in the plan for new debentures with interest payable at 5 per cent. when earned. New debentures—really income bonds without lien yet protected against mortgages

by a provision for equality—will be given only to holders of old debentures—$500 new for each $1000 old. Stockholders, either preferred or common, will get none of them. So far, the substituted debenture is of the same grade as the old one, differing in interest rate and in time of interest payments.

In addition the holder of $1000 old debentures will receive 5 shares (no par value) of 7 per cent. new preferred stock. The interest rate of the new preferred stock is higher than the interest rate of the old debenture but is payable only when earned, cumulative after an early date. As the new preferred stock is at present to be distributed only to holders of old debentures, there is little difference between them as to grade and preference. Then, finally, the holder of $1000 old debentures will receive 20 shares of new common stock for what they may be worth.

Old preferred stock will be exchanged for new common stock, share for share. Holders of these securities apparently are not complaining. Certainly the holders of debentures cannot complain of a stock distribution that does not affect them.

[fol. 103] And, finally, the new corporation will assume and pay the liabilities of the old corporation for taxes, wages, services and merchandise amounting to about $42,000.

We can understand why 96 per cent of the securityholders regard this distribution as fair, particularly as none of the appellants or anyone else has suggested any plan that is better or different. It is in our judgment fair and equitable.

The appellants, however, while declaring the plan of distribution unfair, are opposed to any plan because they say neither this one nor any other can hold out a promise of success. Therefore they insist upon immediate and complete liquidation of the corporation's assets. Notwithstanding the lack of purchasers and the probability of receiving nothing, they take the stand that they prefer, and in law have a right, to know and accept their fate now.

We are constrained to hold, however, that as against the rights of all other creditors they cannot in equity prevail.

In reaching this judgment we have brought into force no new principles of equity. We have simply applied to new facts old principles found in the zone in which the Boyd,

Phipps, Luhrig Collieries, Pusey & Jones and Shapiro cases are landmarks.

There remains a matter raised on appeal by the International Heater Company, one of the intervening defendants, which is not free from difficulties. It appears that two of the companies entering into the merger held two-thirds of the capital stock of Lincoln Radiator Company, the other one-third being held by the International Heater Company, which stayed out of the merger. This one-third interest was acquired by the respondent corporation from the International for $100,000, of which $60,000 remains unpaid, evidenced by an equal face amount of promissory notes due [fol. 104] serially at the rate of $20,000 per annum. These promissory notes and the corporation's outstanding unsecured debentures constitute its entire funded debt. The plan of reorganization covers an offer to the International of securities of the same character and number that are offered to holders of the old debentures. The International says, however, that it never held the corporation's debentures or other formal securities; that, as a creditor under the corporation's notes of hand, it is entitled to payment in cash and therefore has attacked what was done by the court below.

Our trouble has been in classifying the International Heater Company as a creditor, feeling that if properly classified its rights would be those of the class of which it is a member. Manifestly, it is not a secured or a preferred creditor. It is not a merchandise creditor or a creditor in respect to debts currently incurred in the usual course of the corporation's business. It neither sold the corporation merchandise nor rendered it service. It simply sold it shares of stock in another corporation. The notes which were received therefor are indicative that the payee, the International, is a general creditor, nothing more, nothing less. Being so, it stands on the same plane with holders of the debentures who, likewise, are general creditors. Therefore we can see no difference between the two in law and none in the consequences of the receivership. Yet, just here, the International takes the position that there is a difference between itself and holders of debentures, as general creditors, in that it did not buy debenture securities of the corporation with their attendant hazards but accepted its notes promising payment for property sold

and assigned, and that not having bought into the corporation's difficulties it stands outside of matters involving their solution and should be discharged with full payment [fol. 105] of its claim in money. This distinction does not appeal to us as controlling, for the International voluntarily became a general creditor of the corporation, is, as such, involved in its difficulties and can get out only by the means which the court has afforded general creditors who, without regard to the origin of their claims, have that status at the time the securities representing the corporation's assets are to be distributed.

All orders and decrees of the District Court here on appeal are affirmed.

A true copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 106] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4956

LILY CLAPIER, Appellant,

vs.

R. B. FLERSHEM et al., Reorganization Committee of National Radiator Corp., Appellees

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed March 24, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the orders and decrees of the said District Court, here on appeal, in this cause be, and the same are hereby, affirmed, with costs.

Philadelphia, March 24, 1933.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 107] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,662. U. S. Circuit Court of Appeals, Third Circuit. Term No. 65. Lily Clapier, petitioner, vs. Rudolph B. Flershem, Charles O. Cornell, John H. Waters, et al., etc. Petition for a writ of certiorari and exhibit thereto. Filed May 12, 1933. No. 65, O. T., 1933.